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No. 2400

**In the United States Circuit  
Court of Appeals**

**Ninth Circuit**

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**OREGON & CALIFORNIA RAILROAD**

**COMPANY, A Corporation, *et al.*,**

**Defendants and Appellants**

**JOHN L. SNYDER, *et al.*,**

**Cross-Complainants and Appellants**

**WILLIAM F. SLAUGHTER, *et al.*,**

**Interveners and Appellants**

*vs.*

**THE UNITED STATES OF AMERICA,**

**Complainant and Appellee**

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**Brief for Interveners**

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**LEWIS C. GARRIGUS,**

**Attorney and of Counsel for All Interveners.**

**A. C. WOODCOCK,**

**Of Counsel.**

**FILED**

**MAY 16 1914**





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**STATEMENT OF FACTS.**

The Congress of the United States, by an Act bearing date July 25, 1866, made a grant of land in the



State of Oregon in aid of the construction of a railroad to run from Portland, Oregon, to the Oregon and California boundary at a point to intersect or connect with a road to be constructed from a point on the Central Pacific Railroad and running northwardly to the California and Oregon boundary. By Section 12 of the Act creating this grant the Congress reserved the right to "Amend, alter or repeal" said act.

By an Act bearing date the 10th day of April, 1869—no Company having qualified under the terms of the Act of July 25, 1866, to claim the rights granted thereby, and no right having been acquired by any person, nor by any corporation, the Congress amended the said Act of July 25, 1866, by providing amongst other things that: "*And provided further* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding \$2.50 per acre."

Thereafter, to-wit: On June 8, 1869, the Oregon and California Railroad company, having in the meantime acquired all rights of the Oregon Central Railroad Company, a corporation, which had attempted to qualify to accept and acquire the advantages under said Act of July 25, 1866, duly accepted the terms of said Act as amended by the Act of April 10, 1869, such assent and acception being in the words and figures following:

"Resolved, That this company, the Oregon & California Railroad Company of Salem, Oregon, \* \* \* do hereby accept all the provisions, rights, privileges

and franchises of said Act of July 25, A. D. 1866, entitled an Act granting lands to aid in the construction of a railroad and telegraph line from \* \* \* and all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent, and the assent of such company thereto." That this acceptance and assent was filed in the office of the Secretary of the Interior of the United States as required by said Act, the same being a condition precedent to the acquiring of any rights thereunder. That under the rights acquired by said O. & C. Railroad Company by its assent to the terms and conditions of said Act of July, 25, 1866, and the amendments thereto, said Company built the railroad and telegraph line contemplated, has maintained and operated the same, has transported and carried the United States mails, munitions of war, etc., etc., and has done everything required of it by the terms of said Act of July 25, 1866, and the Acts amendatory thereof—*Except* that it has sold lands in larger quantities than one quarter section or 160 acres to one person, and at prices in excess of \$2.50 per acre, and *has refused* to sell lands to persons who have applied to purchase the same under the terms of the grant, to-wit: to these interveners, who each became an actual settler upon a quarter section of said granted lands, made application to purchase the same, tendered the maximum price of \$2.50 an acre therefor and demanded a deed, which application, tender and demand were in the case of each intervener, rejected, denied and refused.

These conditions existed when on September,



1908, the United States of America filed a suit in equity in the Circuit Court of the United States for the District of Oregon, in which suit it demanded a forfeiture of the unsold portions of said grant, or a decree to enforce specific performance of the terms of the grant *upon the grounds of the alleged sales in violation of the terms of the grant, and refusal to sell in compliance with the terms of the grant.*

By proper orders these interveners were made parties to said suit and were permitted to be heard therein as to their alleged rights based upon their several applications, tenders and demands. By its order and decree entered July 1, 1913, the District Court of the United States for the District of Oregon, having jurisdiction of said cause, dismissed the petitions of these interveners upon the ground that they had no equitable interest in the subject matter of said suit.

This statement of facts relates to what is known as the East Side grant, but the same facts apply to the West Side grant made by Act of Congress of May 4, 1870, with the exception that the provision as to the sale of the lands was embraced in the original Act and not in an amendment. All other facts are the same as to both grants, and both are embraced in the suit in question, and the orders and decree entered and rendered therein.

In view of the contention of the Complainant-Appellee that it should have a forfeiture of the unsold portions of the granted lands, another fact is important. The record shows that in a number of instances patents

were issued to purchasers from the railroad company of large bodies of the granted lands, which had been sold in violation of the terms of the grant.

Considering these facts the interveners insist upon the following

## PROPOSITIONS

### I.

The intention of Congress in providing the manner in which the lands should be sold was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto and to make the company, which should qualify under the law to take the rights and privileges granted, the trustee to administer the trust.

### II.

The Complainant-Appellee, having created a trust in the granted lands, having accepted the benefits accruing to itself from the building and operation of the road under and by virtue of the grant, and having invited applications to purchase the lands under the terms of the trust, should not be heard to claim a forfeiture of any portion of the trust estate, but should be required to assist in enforcing the terms of the trust.

### III.

By its acquiescence in sales made by the trustee in violation of the terms of the trust, issuing patents for



lands sold in violation of the terms of the trust, and by encouraging these interveners to qualify as purchasers under the terms of the trust, the Complainant-Appellee is in good conscience and equity estopped from asserting any demand for forfeiture, and must be held to its duty of compelling specific performance for the benefit of those who have qualified as purchasers, and who have acquired an equitable interest in the subject of the trust.

#### IV.

The Appellant, Defendant, O. & C. R. R. Co., having accepted all the terms of the grants, and having under such acceptance received all the rights, privileges and benefits of the grants with the conditions and limitations attached thereto should not be heard to claim any greater rights in the trust estate accepted by it than is given by the plain letter of the law creating the grant, to-wit: the sum of two dollars and fifty cents per acre for each acre of the granted lands which it could or might sell for that price. It should be held strictly to the terms of the trust which it accepted.

#### ASSIGNMENT OF ERRORS

The errors assigned by these interveners are so numerous and so voluminous that it is impracticable to embrace them all in a brief. They cover ninety-six pages of the printed transcript of record and are found at page 8471 in volume sixteen, extending to page 8567

in said volume, being numbered consecutively from 1 to 359. Many of these, however, are repetitions, being repeated for each set of interveners. Only the general assignments, and some of those relating to one set of interveners, will be cited.

By the stipulation entered into by all the parties to this cause, through their respective attorneys, which stipulation is found at page 8652 of the printed transcript of record, it is agreed that the bill in intervention of B. W. Nunnally, et al., shall be printed in the record, and that all other bills in intervention are, in substance and effect, the same.

The assignments of error relating to this bill are found on page 8497 of the printed transcript and are numbered from 111 to 120, ending on page 8499 of the transcript. They are as follows:

### 111

The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to the bill of intervention of the intervener, B. W. Nunnally, and the other interveners with him in his said bill joined, for want of equity in said bill, and

### 112

The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as



Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

## 113

The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

## 114

The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

## 115

The Court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

## 116

The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

## 117

The Court erred in not requiring the Union Trust

Company, individually and as Trustee, to answer said bill in intervention, and

The Court erred in not requiring the complainant to answer said bill in intervention, and

The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively, in said bill, and

The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners and each of them, to the relief prayed for by them and each of them, respectively, in said bill.

The general assignments of error to which the attention of the Court is called begin with No. 281 at page 8539 of the record, and run through to No. 359 on page 8567. They are as follows:

The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and



interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest the defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, *sestui que trustent*, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of \$2.50 per acre for each acre of the land so forfeited, for and on ac-

count of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

## 282

The Court, being a court of equity, erred in decreeing a forfeiture to the Complainant, of all right and interest of the defendants, in or to the lands embraced within the West Side land grant, for breach of the assumed condition contained in the act of May 4, 1870, as

(a) Assuming that said provision was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and



California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, sicuti qui trustent, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of \$2.50 per acre for each acre of the land forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

## 283

The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

(c) The defendant, railroad company, holds legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

The Court erred in not holding that the Government was estopped to claim forfeiture of the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the interveners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein, and

(c) The Government having come into a court of equity is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than \$2.50 per acre, and not positive pro-



visions requiring sales to settlers in quantities not greater than one-quarter section to any one purchaser and at a price not greater than \$2.50 per acre.

The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative, requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than \$2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than \$2.50 per acre.

The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

The Court erred in decreeing a forfeiture of those lands included in either or both of the grants to the

railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad company the sum of \$2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

The Court erred in holding that although the provisions in each and both of said land grants were designed to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers, by themselves monopolizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them except to such persons and in such quantities as it saw fit within the price and terms provided in the grant.



The Court erred in not holding that the purpose of the joint resolution of Congress of April 30, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performance had been decreed by the Court.

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized a forfeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

The Court erred in holding that at the time of the filing of the bill of complaint herein and ever since,

and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said grants or either of them.

## 295

The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

## 296

The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

## 297

The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

## 298

The Court erred in holding as a foundation for a



suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands, nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners, and cross-complainants or any of them.

The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.

The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quieted and confirmed, particularly as to any claim or claims of right, title and interest in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to, or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complainants or any of them.

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any

of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

## 305

The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

## 306

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of May 4, 1870.

## 307

The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them,



from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of May 4, 1870.

## 308

The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

## 309

The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or asserting any right, title, interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

## 310

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and cross-complainants or any of them, from claiming or asserting any right, title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

The Court erred in holding that the word "provided"

introducing the proviso contained in the amendatory act of April 10, 1869, imported a condition subsequent, as

(a) The word "provided" is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to except said grant one year after the pasage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

## 316

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

## 317

The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and



cross-complainants, the lands sought to be purchased by each respectively, upon payment of the purchase price therefor.

## 318

The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants, claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

## 319

The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

## 320

The Court erred in holding that Congress did not intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

## 321

The Court erred in not holding that Congress intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to

sell to them the lands embraced within the grant of July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

The Court erred in holding that Congress did not intend by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

The Court erred in not holding that Congress intended, by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforceable by the interveners and cross-complainants.

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in holding that the provision in the act of May 4, 1870, relating to sale of land to actual settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those



who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said act.

The Court erred in not holding that the provision in the act of May 4, 1870, relating to sale of lands to actual settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided in said act.

The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and in that

(b) "They are not susceptible of identification as such," and,

The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands is a sufficient identification.

## 332

The Court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

## 333

The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances, by the Oregon and California Railroad Company.

## 334

The Court erred in holding that the proviso in the act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

## 335

The Court erred in not holding that the proviso in

the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

## 336

The Court erred in holding that the proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or a covenant creating a trust.

## 337

The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

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The Court erred in holding that the proviso in the



act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settler of the trust in said lands.

The Court erred in holding that the provision in the act of May 4, 1870, is not sufficiently definite and certain to be enforced as covenant to a use or as a trust.

The Court erred in not holding that the provisions in the act of May 4, 1870, is sufficiently definite and certain to be enforced as covenant to a use or as a trust.

The Court erred in holding that the provisions in the act of May 4, 1870, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

The Court erred in not holding that the provision in the act of May 4, 1870, requiring sales to settlers, was intended by Congress as and was and is a covenant to a use only and not a condition subsequent, as

(a) Said provision contains specific and direct commands which were assented to and agreed to and performance thereof promised by the Railroad company, and

(b) Said provision does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

The Court erred in holding that the provisions in the act of May 4, 1870, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in

an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in not holding that the provision in the act of May 4, 1870, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the West Side grant, or any part thereof, except as a settler of the trust in said lands.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant or any part thereof, which it could enforce in this action, except such rights as it has as a settler of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

The Court erred in holding that the United States,



complainant herein, had any right, title or interest in and to the lands embraced within the West Side land grant or any part thereof, which it could enforce in this action, except such rights as it had or has as a settler of the trust in said lands to enforce the provisions of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government, cannot be had.

The Court erred in not holding, on the assumption that the said proviso in the act of April 10, 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

The Court erred in not holding on the assumption that the said provision in the act of May 4, 1870, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said provision.

The Court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each

of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

The Court erred in not holding that the evidence in this cause was insufficient to support or sustain the decree rendered.

The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

The Court erred in not holding that the evidence adduced in support of the complaint of the United States, complainant herein, was not sufficient to entitle complainant to a forfeiture of the title of the lands sought to be purchased by these interveners and cross-complainants or any of them.



The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

The petition and bill in intervention of B. W. Nunnally and others, which states the claims of all the interveners in this suit, is found in volume two of the printed transcript of record and covers pages 541 to 638, both inclusive. Special reference is made to this bill in intervention and the special attention of the Court is invited thereto.

## ARGUMENT

That the legislative intent governs is a principle so well settled that it would be superfluous to cite authorities. In the case at bar that intent is so clearly shown by the proviso contained in the amendatory act of April 10, 1869, that there cannot be two opinions as to what was intended. The language is plain: “And *provided further* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.”

The land *shall be sold*. By whom? By that company which should qualify under the law to accept the grant.

When any company should qualify *under the law*; then, and not until then could the grant become effective; hence, as no company had qualified prior to the amendatory act of April 10, 1869, no right accrued to any company except under the proviso contained in that law. Clearly then, the acceptance of the grant with that stipulation that it should sell the land under that proviso imposed a trust upon the company so accepting, and, when acquired, the lands were held by such company *in trust*, for the use and benefit of such persons as should qualify as purchasers under the terms of the grant.

The defendant-appellant, O. & C. R. R. Co., built the railroad contemplated in the law, creating the grant in question. It has continuously maintained and operated the road; has carried the United States mails; has transported troops and munitions of war; has, in fact, done everything required of it with the one exception of selling the lands in accordance with the terms of the grant. It has sold lands in larger quantities than one-quarter section to one person and at a price in excess of \$2.50 per acre, but, in many instances, the Government has approved such sales, which fact is abundantly shown in the record of this cause. See transcript of record, Vol. 2, pages 1143 to 1147.

These sales and their approval by the Interior Department of the United States were made long prior to the commencement of this suit. Is not the complainant-appellee estopped from complaining of acts which it has so distinctly and repeatedly approved? Should

it be heard to demand a forfeiture of any part of the trust estate upon the ground of sales made in violation of the terms of the trust when it has openly and repeatedly approved such violations? We insist that the appellee is estopped by its own acts in this regard from demanding a forfeiture and that such demand should not be listened to by the Court. But, appellee asserts another ground for its demand, to-wit: That defendant-appellant, the O. & C. R. R. Co., has refused to sell the granted lands to those who have applied to purchase the same *under the terms of the grant*. This is true, but has the appellee been damaged by such refusal? If not why should it be heard to demand a forfeiture upon that ground? Who has any cause to complain of the refusal of the railroad company to sell the lands under the terms of the grant? Palpably those who have applied to purchase under the terms of the grant are the only ones aggrieved by the rejection of their applications; hence they are the only parties who are in position to demand redress. This they have done by coming into Court at the instance of the appellee, and asking the Court to enforce by its decree specific performance of the terms of the grant.

The appellee and the railroad company both insist, however that no *trust* was created in the granted lands, for the reason that no beneficiaries were named; that no class of persons was sufficiently designated so that beneficiaries could be identified. This question must not be determined upon the narrow lines of private trusts created by will, but upon lines of a broad public



policy. The purpose of the Congress was to have the lands acquired naturally by individuals in quantities not exceeding the acreage embraced as a maximum in other acts for acquiring the lands of the public domain—this to prevent a monopoly of the public lands in the hands of large holders. It was certainly not intended by the Congress to *create* a monopoly and prevent settlement of the public lands. The primary object in making such grants has at all times been to facilitate the settling up of the public lands. This purpose has been recognized by the Courts.

In support of the proposition that a trust is effective as such without the naming of beneficiaries the Court's attention is directed to 144 Pa. 428, where the Court held that where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced.

In *Perrin vs. Carey*, 65 U. S. 465 the Court held the following language sufficient to uphold the trust: "To the support of the poor white male and female orphans neither of whose parents are living."

In *Jones vs. Habershaw*, 107 U. S. 174-191, the following was held to be sufficiently definite:

"To one or more Presbyterians or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the State," etc.

In the case of First National Bank of Elgin vs. Schween, 127 Illinois 578, the Court held that "Beneficiaries in a deed of trust need not be designated by name. Hence a deed of trust to secure such farmers and dairy-men as should furnish the grantor with milk to be manufactured into butter and cheese is not void for want of designated beneficiaries."

The books are full of such decisions and a hundred of them might be cited, but the foregoing are sufficient to show the rule to be that "Where a conveyance of an estate is made to grantee, which requires him to dispose of the same in a particular way, or for the benefit of a particular class, a trust is thereby created."

In the case at bar the particular class to whom the lands were required to be sold were "actual settlers." A class easily ascertained, hence the trust intended to be established cannot fail for want of designated beneficiaries. By each selecting a particular portion of the granted land, applying to the railroad company to purchase the same, tendering the maximum price named in the law in payment for such selected lands and demanding a deed therefor, the interveners have established their identity as beneficiaries under the trust, and it is confidently expected that because of the error of the District Court of the United States for the District of Oregon in dismissing their bills of intervention, which error is particularly stated and clearly shown by their assignments of error as stated in the transcript of record, and herein, will be corrected by a decree of this Honorable

Court reversing the decree of said District Court and entering a decree establishing the interests of these interveners as they are asserted in their bills of intervention.

Respectfully submitted,

A. C. WOODCOCK,  
LEWIS C. GARRIGUS,  
Attorneys for Intervenors.

Due service of the within and foregoing brief is hereby accepted.

.....,  
Attorney for Appellee.

.....,  
Attorneys for O. & C. R. R. Co.





**UNITED STATES  
CIRCUIT COURT OF APPEALS  
NINTH CIRCUIT.**

**Appeal from the District Court of the United  
States, for the District of Oregon.**

**OREGON AND CALIFORNIA RAILROAD  
COMPANY, a corporation, et al.,**

*Defendants and Appellants,*

**JOHN L. SNYDER, et al.,**

*Cross-Complainants and Appellants,*

**WILLIAM F. SLAUGHTER, et al.,**

*Intervenors and Appellants,*

**VS.**

**UNITED STATES OF AMERICA,**

*Appellee.*

**Brief of Oregon and California Railroad Company,  
Southern Pacific Company, and Stephen T. Gage,  
Individually and as Trustee, Defendants  
and Appellants.**

**WM. F. HERRIN**

**P. F. DUNNE**

**WM. D. FENTON**

*Solicitors and Attorneys for Defendants and Appellants,  
Oregon and California Railroad Company, Southern  
Pacific Company, and Stephen T. Gage, individually  
and as trustee.*

**FRANK C. CLEARY,**  
*Of Counsel.*

Filed \_\_\_\_\_ 1914

By **FILED** Clerk

By \_\_\_\_\_ MAY 18 1914 Deputy Clerk





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Point I. The Act of Congress of July 25th, 1866, was passed for the primary purpose, not of promoting the settlement of the public lands, but of aiding in the construction of a railroad from a point on the Central Pacific Railroad in the State of California to Portland, in the State of Oregon; and any provision in the later act of April 10, 1869, for the benefit of settlers, must be taken in subordination to this primary purpose....	269 et seq.	465-507
Point II. The settlement clause of the amendment of April 10, 1869, is not a condition subsequent.....	269 et seq.	507-570
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(1) The California and Oregon Railroad Company filed its assent within one year and completed the "first section of twenty miles of said railroad" within two years after the passage of the Act of July 25, 1866.		
(2) The Oregon Central Railroad (East Side) Company was not in default on April 10, 1869.....	269 et seq.	571-610
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Point IV. Under Point IV of Points and Authorities, pages 610-653, Brief, the contention is made that the so-called "actual settler" clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, con- strued so as to give effect to the primary policy of Congress, and to carry out the purpose of the granting acts in the light of long continued, contemporaneous, and permitted construction of these acts, as evidenced by the record, and subsequent legislation of Congress relating to land grants and public lands, did not create a condition subsequent.....	279 et seq.	610-653

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Point V. Under Point V of Points and Authorities, Brief, pages 654-793, the defendants-appellants contend that the United States cannot in equity, as suitor, enforce the "actual settler" clause, assuming that its words create a condition subsequent, because,

- (1) The United States has waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company, from the earliest administration of the grants, to the passage and enforcement of the Act of August 20, 1912. (So-called Innocent Purchasers Act).
- (2) The United States is estopped, in view of all the facts and circumstances, to attempt to enforce the same ..... 303 et seq.      654-793

Summary of the evidence in support of this contention.. 303-338

Point VI. Under Point VI of Points and Authorities, Brief, pages 794-864, the contention is made that a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company to any part of these lands, it could not sell these lands to "actual settlers," for the price named, in the quantities specified, the condition became impossible of performance, and was thereby discharged. The same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, ren-



dered them unfit for disposition under the settlement laws, in accordance with the terms of the condition. Proof of these facts, to the satisfaction of the court, by the voluminous record, is competent and convincing to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance. The proof also shows that the even sections within the limits of the grants, were of the same character, and that they were unfit for disposition under the settlement laws in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 81) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1841, and all other laws allowing appropriation of the public lands, and on September 29, 1890, (26 Stat. 00) passed the General Forfeiture Act, and on August 20, 1912, enacted the so-called Innocent Purchasers Act, (37 Stat. 123) based upon the report of the House Committee on Public Lands, to the effect that these lands sold in alleged violation of the "actual settler" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws. The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors.....

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Summary of the evidence in connection with these contentions.....

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Point VII. Under Point VII of Points and Authorities, Brief, pages 865-873, the contention is made that if the terms of the "actual settler" clause be so indefinite and uncertain as that the company could not, under its terms, fairly construed, ascertain the legal measure of its duty so as to perform the same, and if the law, thus fairly construed, is not enforceable as a covenant or a trust, or contract, for the benefit of "actual settlers," it is clearly and for the same reasons not enforceable as a condition subsequent. There can be no

condition subsequent, whether created by contract between private parties, or by grant by deed, or by legislative grant of public lands, to a private party, assenting to and accepting such grant, which is not clear, definite and certain in its terms. No breach can arise or be assigned upon a contract, deed, or grant, or legislative grant, which is so indefinite or uncertain in its terms as that it does not clearly and necessarily appear exactly what the grantee must (not *may*) do; in what manner the thing required to be done shall (not *may*) be done; for whom or what person it *shall* be done. If the act to be performed is not required to be done in some definite and certain way, by a definite and certain class of persons, and for a definite and certain part of the lands granted, within a certain and definite time, under certain and definite rules and regulations prescribed by law defining the "actual settler," the time and conditions of settlement, and the proof of same,—there can be no assertion of any breach by the grantor, nor re-entry by legislative declaration of forfeiture, or otherwise. The grantee cannot forfeit the estate granted, for breach of a condition the terms of which cannot be specifically and definitely found in the language of the condition. As a covenant, trust, or contract, the "actual settler" clause is not enforceable, and the court below has so held. (Opinion, Vol. II, pp. 696-791-818, Transcript of Record). As a condition subsequent it is likewise not enforceable. The grantee is not obligated to write into the statute rules and regulations by which the Pre-emption or Homestead Laws could be executed as to these lands, nor does the statute adopt such rules or regulations as to procedure, or make the Pre-emption or Homestead Act a part of the "actual settler" clause.....

865-87

Point VIII. Under Point VIII of Points and Authorities, Brief, pages 874-6, the contention is made that if the "actual settler" clause be a condition subsequent, certain, and definite, so as to be otherwise enforceable, then it was repugnant to the grant, and could not have been enforced without destruction of the primary and

dominant purpose of Congress, to aid in construction of road. If the land thus subject to sale could not have been so sold in time to give the aid intended, the condition was destructive of the fee intended to be granted, and the condition must give way as repugnant to the grant. ....

874-876

Point IX. Under Point IX of Points and Authorities, pages 877-929, Brief, the contention is made that the "actual settler" clause contemplated that the sales of land, and construction of road, should be concurrent. It was the intention of Congress that the lands granted should be applied to the building of the road, and this application could only be made by sales of the land pending construction. It was supposed and intended that "actual settlers" would apply to purchase, and that the company would sell to such applicants all these lands, before such construction should be completed. Only in that way could the road be built. It follows, therefore, as a necessary corollary to this primary purpose and intention of Congress, that if for any reason "actual settlers" did not apply to purchase these lands, and if they were not sold by or before the final completion of the road and the acceptance of such completion by the United States, as in performance of the grant, then and thereafter the "actual settler" clause would become inoperative, and whether the words of the "actual settler" clause created a covenant or condition, the estate of the company in the lands unsold, would become absolute and unconditional. It is nowhere claimed by the United States that any lands were sold in violation of this clause prior to the completion and acceptance of the road, and no breach on account of any such sale is assigned.

The fact that no provision is made for the payment of taxes which may be assessed upon these lands, as belonging to the grantee companies, shows that the "actual settler" was such person as may have been upon the land when the grant was made, or as may have entered upon the land as such prior to completion and acceptance of the road, and issuance of patent by direction of the President, for the lands opposite to



and coterminous with the constructed portion of the road. It shows that the title to the lands thus occupied or applied for by the "actual settler" prior to issuance of patent, was regarded as public land, as to assessment and taxation, and that until such patent issued, or the president had directed its issuance, the grant was held in trust for such "actual settler," and that jurisdiction over such land remained with the Land Department, for the benefit of such "actual settler" who could establish his settlement, residence, and cultivation, and the fact that he was a bona fide "actual settler." Under such circumstances the land thus applied for and occupied by such "actual settler" was quasi public land, and as such not subject to assessment and taxation, and hence the statute made no provision for payment of any sum other than the flat double minimum price of \$2.50 per acre.....

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Point X. The lands involved in suit were mainly patented more than five years prior to the commencement of this suit, and these patents were all issued by the United States with full knowledge upon the part of the Government of continuous breaches of the so-called "actual settler" clause. The cause of suit, or action, to recover these lands, and to assert the breach, arose when each breach occurred, and the United States, as to all breaches occurring prior to issuance of patents, is necessarily barred after the expiration of five years following the date of patents issued prior to March 2, 1896, and after six years following the date of patents issued after that date. The Act of March 3, 1891, (26 Stat. 1095) and the Act of March 2, 1896, (29 Stat. 42) read in connection with the Act of September 29, 1890, (26 Stat. 496) is more than a mere statute of limitations, **it is title in fee simple, without condition or possibility of reverter.....**

(2) The Oregon and California Railroad Company, on March 29, 1870, by its deed of that date, became the purchaser, for value, of all the lands granted by the Act of July 25, 1866, to the East Side Company, and on October 6, 1880, by its deed of that date, for value, became purchaser of all the lands granted by

the Act of May 4, 1870, to the West Side Company, and the Oregon and California Railroad Company has been ever since said dates respectively, the bona fide owner and in possession of the lands so granted, and as such, patents issued to it, and, as such, the Oregon and California Railroad Company is a bona fide purchaser, and has been recognized as such by the United States, continually, since the dates of said deeds, respectively.....

930-955

The taxes paid from April 1st, 1870, to April 30th, 1911, were \$1,827,234.10, and from April 30th, 1911 to April 30th, 1914, \$930, 859.97, a total of \$2,758,094.07.

Point XI. (1) The United States may, as sovereign, impose restraints upon alienation of its lands, but it cannot delegate or impose upon a private party such as a citizen, or a railroad company, the substantive administration of sales of its lands, or the administration of its settlement laws. If in granting the fee to the company, under these Acts, the United States imposed a condition which, if enforceable, required the company, in making sales, to usurp the functions and duties of the Land Department of the United States, and administer the settlement laws, and if the United States did not thereby reserve, in some way, the right to enforce or administer its land laws applicable thereto, the condition attempted to be created, is void, and the title is unaffected thereby. The estate vested, absolutely, unaffected by the attempted condition. The intended beneficiaries, if the condition was to be valid and effective, were entitled to require that the United States should retain jurisdiction of the grant, and administer the same. The beneficiaries were entitled to go before a tribunal having jurisdiction and authority, to hear and determine the facts, as to each settlement, which would bring each "actual settler" into a legal and effective relation to the parcel upon which he had settled. The railroad company could not be constituted, and is not, by the settlers clause, made such tribunal. Under the settlers clause neither the United States nor the assumed beneficiaries, the actual settlers, could compel the railroad

company to act as such administrative tribunal, nor would its voluntary action bind any contesting claimant, nor could any court give any defeated contestant any relief, or afford him any remedy. The statute gives no remedy, provides no tribunal, and defines no procedure. It is therefore void.

(2) The title to these granted lands having passed from the United States to the Oregon and California Railroad Company by patents, the land having been earned by construction of roads the estate vested in the company in fee simple. This is conceded by the United States. There is therefore no room for the application of the doctrine that a public grant will be strictly construed in favor of the grantor. Such rule of construction does not apply where the United States seeks to defeat the estate granted, whether by means of a condition subsequent, or other acts that would render the estate defeasible.

(3) The estate once having passed, the law of the state in which the property is situated, as determined by the Supreme Court of that state, will be followed, as a rule of property, in determining whether the language of the so-called "actual settler" clause is a condition subsequent, or a covenant.....

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**UNITED STATES  
CIRCUIT COURT OF APPEALS  
NINTH CIRCUIT.**

OREGON AND CALIFORNIA RAILROAD  
COMPANY, a corporation, et al.,

*Defendants and Appellants,*

JOHN L. SNYDER, et al.,

*Cross-Complainants and Appellants,*

WILLIAM F. SLAUGHTER, et al.,

*Intervenors and Appellants,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**Brief of Oregon and California Railroad Company,  
Southern Pacific Company, and Stephen T. Gage,  
Individually and as Trustee.**

**PART I.**

**STATEMENT OF THE CASE AS MADE BY  
THE TRANSCRIPT OF RECORD**

This appeal is prosecuted by the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, defendants and appellants, from a decree of the District (formerly Circuit) Court of the

United States, for the District of Oregon, entered July 1, 1913, forfeiting to the United States lands of the Oregon and California Railroad Company aggregating about 2,300,000 acres, inuring to the predecessors in interest of the company under the grants made, respectively, by the Act of Congress of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94).

John L. Snyder, and others, cross complainants and appellants, and William F. Slaughter, and others, interveners and appellants, not only joined in the appeal of the Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, but prosecuted their separate cross appeal as cross-complainants and appellants, claiming to be actual settlers upon some of these lands, who had taken actual possession of the several parcels described and had tendered to the company \$2.50 per acre, claiming the right to purchase the respective parcels under the Act of Congress of April 10, 1869, (16 Stat. 47) amendatory of the Act of July 25, 1866, as to the lands granted by the Act of July 25, 1866, and under Section 4 of the Act of May 4, 1870, (16 Stat. 94) as to the lands within the limits of that grant.

The cross-complainants had commenced their several suits in the District (formerly Circuit)

Court of the United States, for the district of Oregon, against the defendants, Oregon and California Railroad Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, for specific performance and to enforce an alleged trust, by which each sought to secure a decree that a deed of conveyance be executed, conveying the land to each cross-complainant as such actual settler under the terms of these statutes, and these suits were all commenced prior to September 4, 1908, when the United States filed its Bill of Complaint in this case against the defendants and appellants herein and against these so-called actual settlers, who had thus commenced their separate suits and who are known in this record as cross-complainants and appellants.

After issue had been joined by the joint and several demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed December 7, 1908, (Vol. II, pp. 677-681 Transcript of Record) to the Bill of Complaint filed by the United States May 25, 1908, (Vol. I, pp. 1-538, Transcript of Record), there was filed on January 15, 1909, a cross complaint by John L. Snyder, and others, cross-complainants and appellants herein, to which the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on February 13, 1909, filed their joint and several demurrer, (Vol. II, pp. 688-92



Transcript of Record) and the Union Trust Company, individually and as trustee, filed a like demurrer on March 1, 1909, (Vol. II, pp. 682-683, Transcript of Record).

On March 2, 1909, B. W. Nunally, and others, filed their petition in intervention, setting up substantially the same matters and things set out in the Bill of Complaint filed by the United States,—in fact, a literal copy of such bill of complaint with express averments admitting and alleging paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX of the Bill of Complaint filed by the United States, and thereafter alleged that B. W. Nunally and the other interveners, respectively, had, prior to the commencement of the suit, applied to the Oregon and California Railroad Company to purchase certain specific quarter sections of land, and had tendered to the company for each several quarter section of land, \$2.50 per acre, and that each had demanded a conveyance, and that each applicant was qualified as and intending to become an actual settler upon such tract of land; and by way of further answer and cross bill, prayed to be allowed to intervene and to have a decree that the company be directed and required to convey to each of the interveners the tracts of land applied for by each respectively, upon payment of the price tendered.

On March 1, 1909, (Vol. II, p. 639, Transcript of Record) the court made an order permitting

these parties to intervene and to file their answer and cross bill, as stated, to which the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer on April 7, 1909, (Vol. II, pp. 685-686, Transcript of Record.)

The records show that in addition to B. W. Nunally and seven others, whose answer and cross complaint are set out in Vol. II, pp. 541-638, Transcript of Record, several thousands of other persons in like situation pleading like facts and claiming like rights as *potential* or possible "actual settlers," were allowed to intervene, and that they filed their bills in intervention by way of answers and cross complaints, and sought the same relief as that sought by B. W. Nunally and seven others.

To each of these several bills in intervention filed by way of answers and cross complaints, the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer, of like tenor and effect as the demurrer filed to the petition in intervention, answer and cross complaint of B. W. Nunally and others.

On March 13, 1909, after an extended argument upon the demurrers to the Bill of Complaint and the demurrers to the cross complaints of the cross-complainants, defendants herein, and to the petitions in intervention filed by way of answers and cross bills of the interveners and appellants herein,

the cause was submitted upon the record thus made, and on April 24, 1911, the court overruled the demurrer to the Bill of Complaint and sustained each of the demurrers to the cross complaints and complaints in intervention filed by way of answers and cross bills. The opinion of the court on these demurrers, announced April 24, 1911, will be found in Vol. II, pp. 696-855, Transcript of Record.

Thereafter, and within the time allowed by the court, the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and the Union Trust Company of New York, individually and as trustee, hereinafter known in this record as defendants and appellants, on September 5, 1911, (Vol. II, pp. 859-1155, Transcript of Record) and January 2, 1912, (Vol. III, pp. 1165-1280, Transcript of Record) filed their respective amended joint and several answers to the Bill of Complaint, and on November 1, 1911, replication was filed by the United States, (Vol. III, p. 1281, Transcript of Record) to the joint and several amended answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and on November 3, 1911, (Vol. III, p. 1282, Transcript of Record) replication was filed by the United States to the amended answer of the Union Trust Company, it being understood that these replications should be deemed filed as of December 8, 1911, at the time the court made an order (Vol. II, p. 857, Trans-



cript of Record) appointing Miss M. A. Fleming, of Portland, Oregon, special examiner to take and report the testimony herein.

On January 3, 1913, the defendants-appellants and the United States filed a stipulation in writing called a "Stipulation as to the Facts," (Vol. IV, pp. 1552-1731, Transcript of Record).

Thereafter, pursuant to the order of reference, testimony was offered and admitted in evidence by the respective parties and reported to the court, consisting of ten type-written volumes, and fifty-two exhibits offered on behalf of the United States, (Vol. IX, p. 4285 to Vol. XI, p. 5767, and Vol. IV, pp. 1910-1920, in all 1492 pages, Transcript of Record), and one hundred fifty-nine exhibits offered on behalf of the defendants-appellants, (Vol. XI, p. 5767 to Vol. XV, p. 7919, Vol. IV, pp. 2034, 2044, 2048, Vol. V, pp. 2544, 2551, in all 2173 pages, Transcript of Record)\*, which evidence has been embodied in a "Statement of the Evidence," (Vol. IV, p. 1551, up to and including Vol. XV, p. 7922, Transcript of the Record.)

Under stipulation of the parties and order of the court below, made and filed March 14, 1914, (vol. 16, pp. 8652, 8667,) in order to avoid expense it was agreed that the appeal of the cross-complainants and appellants and interveners and appellants should be tried upon the appeal of the defendants-

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\*All the exhibits of the defendants have not been printed.

appellants upon the same transcript of record, and that the case of the defendants-cross-complainants should be heard upon the record as to the cross complaint of John L. Snyder and others, and the case of the interveners-appellants should be heard upon the record as to B. W. Nunally and others, and that it should not be necessary to include in the printed transcript of record any of the papers or proceedings pertaining to any of the other defendants-cross-complainants or any of the other interveners-appellants, and that the decision of the court on any appeal as to the cross complaint of John L. Snyder and others, and as to the appeal as to the interveners-appellants, B. W. Nunally and others, should be controlling as to all of said cross-complainants and interveners-appellants; that any part of the record which might be printed on the main or cross appeal might be considered by the court and that all questions raised by any joint assignment of error and filed in the main appeal by the cross-complainants and the interveners should be considered with and have like effect as though made and filed separately by each of the cross-complainants and interveners joining therein, and that in the separate or cross appeal of the cross-complainants and interveners from the several orders of dismissal and from the judgment and decree entered, from which the appeal is prosecuted, any questions raised by any joint assignment of error filed by said cross-complainants and interveners or either of them shall be considered with and have like

effect as though made and filed separately by each of the parties joining therein, and that in addition to the printed record and Statement of the Evidence, with such exhibits or parts of exhibits as might be included therein, the original report, consisting of ten type-written volumes of the evidence taken in the cause by the special examiner, together with the original exhibits referred to therein, including those described in the printed record containing the Statement of the Evidence, should be certified to the Appellate Courts to be used in the trial of the cause, and in the event of an allegation by either party of an omission or error, subject to such objections as to the competency, relevancy or materiality of any part of the testimony and exhibits as may have been taken and duly reserved in the record, and that these reports and exhibits may be used by the parties for reference for the purpose of correcting any errors or omissions as may appear to the court, and for such direct use in the Appellate Courts as may be contemplated by the Equity Rules of the Supreme Court of the United States and as provided by the Act of February 13, 1911, page 275, United States Compiled Statutes, Supplement 1911, and as contemplated by Rule 14, subdivision 4, of the United States Circuit Court of Appeals.

The Statement of the Evidence was prepared and filed under and pursuant to Rule 75, Rules of Practice for the Courts of Equity of the United States, and on March 4, 1914, (Vol. XV, pp. 7291, 7292,



Transcript of Record) the court made an order by which such Statement of the Evidence was approved, directed to be filed of that date, and to become a part of the record for the purpose of the appeal. In accordance with Rule 75, it appeared to the court that the parties were unable to agree as to the reduction of so much of the testimony to narrative form in the Statement of the Evidence as is set out therein by question and answer, and the court found that in its judgment such testimony, thus set out by question and answer, should be reproduced in the exact words as reported and stated in the Statement of the Evidence; and it further appearing to the court that the remainder of the testimony had been reduced and stated in narrative form, the court found that the Statement of the Evidence, as thus prepared, was true, complete and properly prepared, as provided by Rule 75.

The testimony in support of the issues of the respective parties, as tendered by the pleadings, is voluminous, and such portions of the testimony as may be deemed material and controlling upon questions of fact will be set out in this brief under appropriate headings in the discussion of the legal questions involved.

The opinion of Judge Wolverton upon the demurrer, and consisting of one hundred fifty-nine printed pages, (Vol. II, pp. 696, 855, Transcript of Record) is grounded upon his construction of the

Act of Congress of July 25, 1866, as amended April 10, 1869, and the Act of May 4, 1870, interpreted in the light of the allegations of fact in the Bill of Complaint admitted by the demurrer to be true. A like situation controlled his opinion upon the demurrer to the cross complaints of the so-called "*actual settlers*," and the demurrer to the bills in intervention filed by way of answers and cross complaints by the so-called intervening, "*possible actual settlers*." The cross-complainants and interveners stood upon the order of the court sustaining the demurrers interposed by the Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee. The allegations of fact made in the Bill of Complaint have not only been challenged by the amended answer of the principal defendants named, but substantive, affirmative defenses have been pleaded in the joint and several answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and the amended answer of the Union Trust Company, individually and as trustee. In this situation, notwithstanding the defenses thus made, and the voluminous testimony taken by the Government, as well as by the defendants, it was deemed advisable, in order to expedite the progress of the cause, to submit the case on April 28, 1913, without argument.

It is only fair to the parties and to the learned judge of the court below that this state of the record should be brought to the attention of this court.

On April 29, 1913, Judge Wolverton delivered a short, oral opinion, which, with the colloquy between counsel and the court, is as follows:

Wolverton, District Judge:

Case No. 3340, the case of the United States against the Oregon and California Railroad Company and others, was submitted on last evening, without argument, to the court, upon the merits of the cause, for its determination.

The vital and paramount question in the case is with reference to the condition that was imposed by the Government at the time the grant of these lands was made to the Oregon Central Railroad Company, the predecessor of the defendant Oregon and California Railroad Company. That condition is as follows:

“Provided, further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.”

At the time the cause was submitted on demurrer, it was argued very ably and very exhaustively by counsel upon both sides, and the court, after hearing the arguments, gave long consideration and its best judgment to the questions involved, and proceeded to determine all the questions that seemed to be concerned in the cause. At this time the counsel, in submitting the cause, are not questioning the



soundness of the decision rendered at that time, and it is only upon the matters of fact that the case is now submitted.

A very great deal of testimony has been taken in the case, running up into several thousand pages of type-written matter, and besides that a very great many exhibits in various forms would have to be examined should the court go through the entire testimony. But I do not deem it necessary for the court at this time, the cause having been submitted without argument, to enter into a through or any extended investigation of the testimony. The vital question in the case, and the paramount question, as previously observed, is touching the condition attending the grant. The court held that the condition was a condition subsequent, and that for a violation of that condition the grant should be forfeited to the Government of the United States.

The counsel in the case have stipulated as to certain facts so as to abbreviate the evidence as much as possible, and in that stipulation is found the following:

“Item 4.

“From about 1894 to 1903, the said Oregon and California Railroad Company sold and disposed of some of its said granted lands to persons not actual settlers in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre; and in several instances, between the said dates, the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from \$5.00 to \$20.00 per

acre, in one instance at \$35.00 per acre, in one instance at \$40.00 per acre, and in one instance a sale of 45,000 acres at \$7.00 per acre was made by the said Company to a single purchaser.

“Item 5. The defendant Oregon and California Railroad Company has heretofore made approximately 5,306 sales of its land-grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres.

“Item 6. Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 per acre; approximately 478,000 acres of which 524,000 acres were sold since the year 1897; and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser.” (Subdivision VII, Items 4, 5, and 6, “Stipulation as to the Facts” Vol. IV, pp. 1578-9, Transcript of Record)

Now it is further stipulated that:

“Item 4.

“On or about January 1st, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands; and the said Company at all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next

preceding 'Item 3' of this subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose.

"Item 5. The defendant Oregon and California Railroad Company now assumes and asserts an absolute and unconditional estate in and to all of the said unsold lands." (Subdivision IX, Items 4 and 5 "Stipulation as to the Facts", Vol. IV, pp. 1581-2, Transcript of Record).

Upon the theory adopted by this court in its determination of the cause upon the demurrer, the facts set out in the stipulation show an infraction of the law. They show a violation of the condition subsequent, the court having held that this proviso in the statute constituted a condition subsequent which was a part of the law and must be complied with by the railroad company, and if the company violated the same by refusing to sell in quantities not exceeding 160 acres or to actual settlers, or for a price not exceeding \$2.50 per acre, then that the lands should be forfeited. This stipulation shows that the company has violated that provision, first, in selling large quantities of these lands, in tracts exceeding 160 acres to single purchasers, and for prices largely exceeding the \$2.50 per acre which is prescribed by the statute. Furthermore, the stipulation shows that the railroad company has absolutely withdrawn these lands from sale. And, as I have remarked, under the theory adopted by the court, this stipulation on the part of counsel shows a clear violation of the provisos of the



law, and therefore that the company has put itself in a condition or position whereby the Government is entitled to have a forfeiture of these lands declared.

Of course, there are many other questions which have been discussed, and which were discussed at the time of the previous hearing, but those questions are all subsidiary, *perhaps, save and except that the railroad company claims that the Government is estopped by standing by, knowing that these lands were being sold, and allowing them to be sold in this way, and therefore that the Government ought not to prosecute this proceeding.* I have given the gist of the defense pleaded in that manner. But the court determined that matter in the hearing upon the demurrer. The question as raised at that time was as to the matter of estoppel, and the court then determined the legal question. I do not think, *so far as I have looked into the testimony*, that the issues are changed in the least.

Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant—it is a law, and people dealing with the grant must take notice of the terms thereof, and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest that the Government might acquire in the

property by reason of an infraction of the law which would entail a forfeiture of the grant.

I think that will dispose of the case. The court will direct that a decree be entered forfeiting these lands to the United States Government, and adjudging that the Government recover its costs and disbursements.

Mr. Fenton: If the court please, I think your Honor inadvertently stated in the oral opinion which your Honor has just announced that the defendants conceded the soundness of your Honor's opinion in the case; and, of course, *we could not do that*.

COURT: Well, *I did not mean that*. I might put it in this way: That the counsel, in submitting the cause without argument, did not question the soundness of the opinion; that is, *did not insist upon a reargument of the legal questions heretofore determined*.

Mr. Fenton: We did not wish to be put in the attitude of having conceded that it was sound; but we are perfectly willing to have it conceded that we did not by argument challenge your Honor's opinion. *In other words, we do not wish to be considered as assenting in any way to the conclusion of law which your Honor arrived at*.

COURT: *I understand that*.

Mr. Townsend: May I inquire if the decree will also cover the other ancillary relief prayed for in the bill, that is, quieting the title, and several prayers for injunction—enjoining against incumbrance of the title, and enjoining against waste, etc.

COURT: I suppose it will quiet the title,

and in that respect would be sufficient in this case, would it not?

Mr. Townsend: I understand that the order for the decree is substantially the relief as prayed for in the bill of complaint. The first paragraph of the prayer for relief contains three alternative prayers. I understand your Honor to grant the first one for forfeiture.

COURT: Yes.

Mr. Townsend: But the other portions of the prayer for relief are not in the alternative, and are all ancillary to a decree of forfeiture, your Honor.

COURT: Well, of course, all the alternative relief should not be granted.

Mr. Townsend: I understand.

COURT: The principal relief which you pray for should be granted, and the decree may be entered accordingly. I suppose it will be submitted to counsel on the other side before it is entered.

Mr. Townsend: May I prepare a proposed form of decree and submit it to the court and to counsel?

COURT: Yes. The form of decree should be submitted to the court and the counsel. Counsel should see the decree.

Mr. Fenton: I think, if the court please, it is at this time proper for your Honor to pass a final decree upon the cross-complaints and the complaints of the interveners. Your Honor will recall that a demurrer was sustained to each of the cross-complaints and to the complaints of the interveners, and the entry of dismissal was not made because your Honor



thought it should go to the final decree in the case.

COURT: There is a stipulation entered into to that effect.

Mr. Fenton: Yes, a stipulation to that effect. And your Honor will recall there was an effort made to vacate the stipulation, and your Honor held that, independently of the stipulation, and certainly with the stipulation, it would have to go to final decree, when your Honor would, depending upon what the decree was in this cause, enter a proper decree; and I suggest that there should be a decree against the cross-complainants and the interveners dismissing their cross-complaints and their complaints of intervention.

COURT: I think that would be proper.

Mr. Townsend: I understood that that was simply postponed until judgment was pronounced as between the Government and the railroad company.

COURT: On the main case.

Mr. Townsend: Yes.

COURT: Yes.

Mr. Fenton: Now, will Government's counsel prepare that decree on cross-complaint?

Mr. Townsend: I think you better prepare that, because it is in response to your demurrers. You see the Government did not raise any issue with the cross-complainants.

Mr. Fenton: I will submit, then, your Honor, a brief short decree dismissing those cross-complaints.

COURT: Very well.

Mr. Fenton: I was going to ask your Honor

to suspend the entry of any decree in this cause until the Government's counsel and ourselves can arrange with the examiner to perfect the record and report it in. *There are some exhibits that have yet to be submitted to the examiner, by the consent of all parties.* And I suggest that when this decree is entered it might be entered as of a date later than that time, which will probably be Saturday.

Mr. Townsend: I don't expect to get that form of decree up before the other record is completed anyway.

Mr. Fenton: Very well.

COURT: How long will that take?

Mr. Townsend: Just two or three days.

Court: Oh, very well.

Mr. Fenton: I was going to suggest that the court make no order at this time of record, and that the decree be passed as of the date when the form is submitted.

COURT: Is that satisfactory to the Government?

Mr. Townsend: Yes, that is all right.

Mr. Gearin: If the court please, yesterday permission was granted to the railroad company and the Union Trust Company to file an amendment to their answers. Mr. Fenton has prepared and served his. Mine will be, as far as anybody knows, exactly the same, but your Honor understands I have to send it East, and it is understood that I may attach it at any reasonable time.

COURT: Very well, that will be understood. There will be no question about that.

Mr. Townsend: No.

COURT: The court will allow any amendment you want in that direction.

Pursuant to this oral opinion, Mr. B. D. Townsend, assistant to the Attorney General, representing the United States, prepared a decree of forfeiture which was entered on July 1, 1913, (Vol. III, pp. 1296, 1550, Transcript of Record) from which decree the defendants, cross-complainants and interveners have prosecuted their joint and several appeal to this court, and the cross-complainants and interveners have likewise prosecuted their separate appeal, and both appeals, under stipulation of parties, just mentioned, are to be tried upon a single record and the appeals submitted at the same time.

By the decree of July 1, 1913, it was ordered, adjudged and decreed—

“That all of those certain lands and estates in lands hereinafter described have become, and now are, forfeited to, and the title to all of said lands and estates in lands has reverted to, and now is revested in the United States of America, and all of said lands and estates in lands now are the absolute property of the United States of America, free from any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein or either or any of them, or any party or parties claiming under them or either or any of them.

“That the title of the United States of America to all of said lands and estates in



lands be, and the same hereby is, quieted and confirmed, and particularly as to any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein, and each and every of them, and each and every party or parties claiming under them or either or any of them.

“That each and all of the defendants, cross-complainants and interveners herein, and their respective officers and agents, be, and they and each of them hereby are, forever enjoined and restrained from in any manner claiming or asserting any right, title, interest or lien, in, to or upon the aforesaid lands and estates in lands, or any part thereof; and from in any manner selling, conveying, leasing or disposing of, any of said lands or estates in lands, or any interest therein; and from negotiating, executing or recording any document or instrument, and from doing any other act or thing, which shall in any manner affect or encumber the title to said lands or estates in lands, or any part thereof; and from going upon said lands or any part thereof; and from cutting, removing or in any manner using or injuring any of the timber or other natural products thereof; and from in any manner committing trespass upon said lands or any part thereof; and from in any manner using or interfering with said lands and estates in lands or any part thereof, or the title or possession thereof; and from contracting with, inviting, inducing or in any manner whatsoever permitting others to do any of the things aforesaid.

“It appearing to the court that demurrers or motions to dismiss were heretofore interposed by the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, and that motions to dismiss were heretofore interposed by the complainant, the United States of America, as to each and all of the cross-complaints and bills and petitions in intervention heretofore filed herein, and that all of said demurrers and motions to dismiss have heretofore been sustained, and that each and all of said cross-complainants and interveners have declined to further plead herein, it is further ordered, adjudged and decreed that each and all of said cross complaints and bills and petitions in intervention be, and hereby are, dismissed for want of equity, with costs in favor of the prevailing parties, respectively, to be hereafter taxed.

“The court being of the opinion that the complainant is not entitled to an accounting by any of the defendants in addition to the other relief granted to said complainant by the terms of this judgment and decree, it is further ordered, adjudged and decreed that the complainant’s prayer for an accounting be, and the same hereby is, denied.

“It is further ordered, adjudged and decreed that the complainant, the United States of America, have and recover from the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, its lawful costs and disbursements herein, taxed at \$....., and that execution issue therefor.

On August 29, 1913, the defendants-appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, together with the defendants-cross-complainants (appellants herein), John L. Snyder and sixty-six others, and William F. Slaughter and 5850 others, interveners-defendants, (appellants herein) filed their and each of their petition for appeal, and their and each of their assignments of errors therewith, which petition for allowance of appeal was, on August 29, 1913, granted, and the appeal allowed, (Vol. XV, pp. 7923-8021, Transcript of Record.) The assignment of errors of the Oregon and California Railroad Company is set out in Volume XV, pp. 8222, 8267, Transcript of Record; the assignment of errors of the Southern Pacific Company is set out in Volume XV, pages 8138, 8198, Transcript of Record; and the assignment of errors of Stephen T. Gage, individually and as trustee, is set out in Volume XV, pp. 8077, 8198, Transcript of Record. The assignment of errors of each of the defendants named is the same. At the same time John L. Snyder and others, cross-complainants, served and filed their assignment of errors, (Vol. XV, pp. 8199, 8222, Transcript of Record) and J. H. Haggett and all other defendants-intervenors, filed their assignment of errors, (Vol. XV, pp. 8283, 8391.) A petition for separate appeal, on November 11, 1913, (Vol. XVI, pp. 8428, 8469, Transcript of Record) was filed by the de-



fendants-cross-complainants and interveners, and on the same day an order was made allowing such appeal. On November 11, 1913, the defendants-cross-complainants and interveners filed their assignment of errors, (Vol. XVI, p. 8470, Transcript of Record) which is identical with the assignment of errors filed by the defendants-cross-complainants and interveners in connection with the main appeal, (Vol. XV, pp. 8283, 8391, Transcript of Record.) The errors assigned by the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, need not be restated at this time but will be discussed under the points made under the discussion of

- (1) Questions of fact;
- (2) Questions of law

and without further particular reference or re-statement of the assignment of errors other than by reference to the same, (Vol. XV, pp. 8222, 8282, Transcript of Record.)

## THE PLEADINGS.

*STATEMENT OF THE CASE,*

as made by the

## BILL OF COMPLAINT.

On February 17, 1907, the Legislative Assembly of the State of Oregon adopted and forwarded to the President, the Senate, and the House of Representatives of the United States, a memorial, representing, in substance, that vast tracts of public lands in Oregon were claimed and held by the Oregon and California Railroad Company under the Acts of Congress of July 25, 1866, and April 10, 1869, (Vol. I, p. 520, Transcript of Record); that these lands were then withdrawn from sale, whereby the development and material prosperity of the state was retarded; that the company had not complied with the Act of April 10, 1869, as to the terms of sale and parcels of land to be sold; that the conditions were claimed to inure only to the United States, as grantor to the predecessor of the company, and had not been complied with; that for these reasons the memorialist asked that the Congress of the United States be and it was requested to enact such laws, and take such steps, by resolution or otherwise, as might be necessary to compel the company to comply with the conditions of the grant, and to enact and declare some sufficient penalty for non-compliance therewith, by way of forfeiture, or otherwise, as in the wisdom of Congress might seem best, and that the senators

and representatives in Congress from the State of Oregon and all other land grant states, be and they were requested to use their utmost endeavor to procure the needed legislation suggested. A copy of this memorial was directed to be forwarded to the President, and to the senators and representatives in Congress from the State of Oregon. Thereupon, on April 30, 1908, Congress passed a Joint Resolution, Vol. I, pp. 67, 68 Transcript of Record) 35 Stat. 571, by which Congress provided, in substance, that the Attorney General be and he was thereby authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he might deem adequate and appropriate, to enforce any and all rights and remedies of the United States, in any manner arising or growing out of or pertaining to the following Acts of Congress:

(1) Act of Congress of July 25, 1866, (14 Stat. 239) as amended by Act of June 25, 1868, (15 Stat. 80) and as amended April 10, 1869, (16 Stat. 47).

(2) Act of Congress of May 4, 1870, (16 Stat. 94).

(3) Act of Congress of March 3, 1869 (15 Stat. 340).

Pursuant to this resolution, the United States filed its bill of complaint, on September 4, 1908, (Vol. I, pp. 1-86) with exhibits thereto, (Vol. I, pp. 89-538 Transcript of Record). After alleging



the incorporation of the defendant companies, and the citizenship of the defendants, cross-complainants, the bill pleads the Acts of Congress of July 25, 1866, (14 Stat. 239), of June 25, 1868, (15 Stat. 80), the incorporation of the Oregon Central Railroad Company on October 6, 1866, (known in this record as West Side Company), the Joint Resolution of the legislature of the State of Oregon of October 10, 1866, designating the Oregon Central Railroad Company (West Side) as the Oregon company entitled to the benefit of the Act of July 25, 1866, the acceptance of that act by the West Side Company, filed in the office of the Secretary of the Interior, July 6, 1867, with a certified copy of the Resolution of October 10, 1866, and that on August 20, 1868, the West Side Company filed in the office of the Secretary of the Interior, a general map of survey of its projected line of railroad; that on April 22, 1867, certain persons contended that the West Side Company was never lawfully incorporated, and desired to secure the benefit of the Act of Congress approved July 25, 1866, and in that behalf incorporated the Oregon Central Railroad Company, (known in this record as the East Side Company); that on October 20, 1868, the Legislative Assembly passed a Joint Resolution, (Vol. I, p. 17 Transcript of Record), rescinding House Joint Resolution No. 13, passed October 10, 1866, which attempted to designate the Oregon Central Railroad Company, (West Side) as the Oregon company entitled to the benefit of the Act of Congress of July 25, 1866, and

recited that the West Side Company was not organized or in existence on October 10, 1866, and that House Joint Resolution No. 13 was adopted under a misapprehension of facts as to the organization and existence of that company, and reciting that the designation of the company to receive the lands in the State of Oregon, so granted, and the benefits and privileges conferred by the Act of Congress, yet remained to be made, designated the Oregon Central Railroad Company incorporated April 22, 1867, under the laws of the State of Oregon, as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the Act of July 25, 1866; that thereupon a controversy arose between the West Side Company and the East Side Company, which continued until along or about January, 1870.

The complaint attempts to plead certain conclusions of law which the Government contends are justified by the Act of Congress of July 25, 1866, the action of the legislature of the State of Oregon in respect to the two companies, and the legal result which the pleader claims followed the action of the two companies in respect to this legislation; that thereupon Congress on April 10, 1869, (16 Stat. 47) passed an act set out in the bill, (Vol. I, pp. 20, 21) under which it is claimed the grantee, and its successor in interest, was obligated, under penalty of forfeiture for breach of alleged conditions subsequent, to sell the lands granted, to "actual settlers only, in

quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 per acre;" that thereafter, on June 8, 1869, the East Side Company adopted a resolution accepting all the provisions, rights, privileges and franchises of the Act of July 25, 1866, and of all acts amendatory thereof, and upon the conditions therein specified, and assented thereto, and directed the Secretary of the company to forward a certified copy of this resolution, under the seal of the corporation, signed by himself as Secretary, and by the President of the company, to the Secretary of the Interior, to be filed in his office, and that on or about June 30, 1869, in accordance therewith, the East Side Company filed in the office of the Secretary of the Interior, such certified copy; that on October 29, 1869, the East Side Company filed in the office of the Secretary of the Interior, a map of survey and location of the first sixty miles of its projected line of railroad, and on December 24, 1869, completed the construction of the first twenty miles of its line, commencing at the City of Portland, and on December 31, 1869, the same was examined and approved by commissioners appointed therefor, pursuant to the Act of Congress of July 25, 1866; that the West Side Company wholly failed to complete the construction of any part of its line of railroad, under the Act of Congress mentioned, and "on or about the month of January, A. D. 1870, said West Side Company acquiesced in the aforesaid substitution of said East Side Company as the recipient of the aforesaid



grants, privileges and franchises, and abandoned and waived all claim thereto, and, in lieu thereof, applied for, obtained and accepted a separate and similar grant of lands, franchises and other benefits pertaining to its line of railroad projected as aforesaid, by Act of Congress approved May 4, 1870."

The bill then alleges that "by reason of the premises no right, title or interest in or to any of the grants, franchises or other benefits of said Acts of Congress approved July 25, 1866, was ever acquired by said West Side Company, or by, through or under it, or by said East Side Company, or by, through or under it, *excepting by virtue of, and expressly subject to, all of the terms and conditions of said Act of Congress of April 10, 1869;*" that in the meantime, as the result of certain litigation involving the East Side Company, its promoters, officers, and stockholders, on March 17, 1870, organized the Oregon and California Railroad Company, setting out, in Exhibit A, and as a part of the bill, a copy of its Articles of Incorporation. (Vol. I, pp. 89-92 Transcript of Record). It is alleged that the principal object of this corporation was to become the successor of the East Side Company, and as such to receive and exercise the grants, franchises and privileges of the Act of Congress of July 25, 1866, and the acts amendatory thereof, and that pursuant to this object, on or about March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company, a deed purport-

ing to assign, transfer and convey to the Oregon and California Railroad Company, all the property of the former, including its right, title and interest in and to the grants, franchises and other benefits of the Acts of Congress mentioned, a copy of which conveyance is set out and made a part of the bill of complaint, marked Exhibit B, (Vol. I, pp. 93-125 Transcript of Record) ; "that during the months of March and April, 1870, said instrument last described was recorded in the office of the county recorder of the several counties in which was situate any part of the lands granted by said Act of Congress approved July 25, 1866, and the aforesaid acts amendatory thereof." (Vol. I, p. 26 Transcript of Record)

It is further alleged that the purpose, intent and effect of this deed was and is, not to operate as a sale or conveyance of the lands granted by the Act of Congress, but to constitute the Oregon & California Railroad Company "the successor of said East Side Company, to construct, complete and equip the line of railroad aforesaid, and in aid thereof, to receive and exercise the grants, franchises and other benefits in that behalf extended by Congress, as aforesaid, and upon all of the terms and conditions aforesaid, and not otherwise."

It will be noted that the pleader states a legal conclusion, deducible as it is claimed, from the instrument, the purpose being to avoid the legal effect

of the sale of the grant *in solido* to the Oregon and California Railroad Company, for sufficient and adequate consideration, and the resulting breach of the alleged condition subsequent, claimed to be created by the proviso in the Act of April 10, 1869, and notice of such sale and breach by the recorded deed, so recorded in the public records of all the counties in which any part of the granted lands is situated, and so recorded as early as April, 1870.

The bill follows this allegation by an averment that on March 29, 1870, the East Side Company was dissolved, and that no corporate powers or franchises have ever been exercised by that company since that date; that on April 4, 1870, the Oregon and California Railroad Company adopted a resolution reciting its purchase and assignment from the East Side Company of all the railroad, franchises and other property of that company, including all the right, title and interest claimed, both legal and equitable, absolute and contingent, by that company, of, in and to the lands and all other benefits granted to the Oregon company by the Act of Congress of July 25, 1866, and amendments thereto, and by said resolution accepted the grant conferred by said Act of Congress, and all the benefits and emoluments therein or thereby granted, and upon the terms and conditions therein specified, and directed the President and Secretary to file the assent of the company to such Act of Congress, and amendments thereto, in the office of the Secre-



tary of the Interior, by filing a copy of the resolution in such office, certified under the seal of the company, and signed by the President and Secretary thereof, respectively, and "that a copy of the deed of assignment from said Oregon Central Railroad Company, certified to by the President and Secretary, under the seal of this company, be also filed in such office of the Secretary of the Interior, and accompany these resolutions;" that on or about April 28, 1870, the Oregon and California Railroad Company filed in the office of the Secretary of the Interior, an authenticated copy of the resolution, and a certified copy of the deed of date March 29, 1870, and that at all times since that time, the Oregon and California Railroad Company has assumed, and still assumes, to be the successor of the East Side Company, and of all its rights under the Acts of Congress mentioned.

*In arguendo* it is pleaded that the West Side Company had abandoned and waived all claim to the grants, franchises and other benefits of the Act of Congress of July 25, 1866, and thereupon "did importune the Congress of the United States to extend to it, in lieu thereof, a similar grant of lands, etc.," pertaining to its projected line known as the West Side line, and that thereafter Congress passed the Act of May 4, 1870, (16 Stat. 94), copy of which is set out in Vol. I, pp. 28-32, Transcript of Record; that by the words "Oregon Central Railroad Company" mentioned in said Act of Congress, refer-

ence was made to the West Side Company, and that the line of railroad mentioned in the Act extended from the City of Portland to McMinnville, by way of Forest Grove, and was the identical line theretofore projected by the West Side Company; that on July 2, 1870, the West Side Company adopted a resolution assenting to and accepting all of the provisions of the Act of Congress of May 4, 1870, and on July 20, 1870, an authenticated copy thereof was by the West Side Company filed in the office of the Secretary of the Interior; that on August 15, 1870, all of the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon and California Railroad Company, and thereafter all of the stock of both companies was held by a single interest, and the affairs of the two companies were conducted virtually as a single enterprise, until the dissolution of the West Side Company; that all of the original capital stock of the Oregon and California Railroad Company, and substantially all of the stock of the West Side Company, was issued without consideration, and that by reason thereof, neither of the companies had any original capital or other funds for construction or other purposes, excepting as was borrowed therefor; that by the issuance, negotiation or pledge of mortgage bonds, and otherwise, approximately \$8,000,000, during the year 1870, was procured by the Oregon and California Railroad Company, and approximately \$1,000,000 was, during the year 1871, procured by the West

Side Company, and with these funds the work of construction of the respective lines was prosecuted, until on or about January, 1873, and that during such period, the East Side line was constructed and extended from Portland to a point near Roseburg, a distance of about 197 miles, including the first twenty miles constructed by the East Side Company, and that said West Side line was constructed and completed from Portland to McMinnville, by way of Forest Grove, a distance of about 47 miles; that in January, 1873, these funds became exhausted, both companies bankrupt and insolvent, and because thereof, construction of both lines was abandoned, and that as to the East Side line, construction was not resumed until June, 1881, and as to the West Side line, was never resumed; that because of the situation, on July 24, 1874, the direction and control of the financial affairs of the two companies were assumed, and thereafter exercised, by the then creditors, under the name "Bondholders Committee;" that on February 29, 1876, all of the capital stock of both companies was for a nominal consideration, acquired by the "Bondholders Committee," and thereafter all of the affairs of the two companies were conducted by and under the direction and control of the "Bondholders Committee;" that on October 6, 1880, for the purpose of merging said West Side Company into said Oregon and California Railroad Company, and under the direction and influence of said "Bondholders Committee," the West Side Company executed and delivered a deed



to the Oregon and California Railroad Company purporting "to assign, transfer and convey" to the Oregon and California Railroad Company all of the property of the West Side Company, including the right, title and interest of that company in and to the grants, franchises and other benefits of the Act of Congress of May 4, 1870, a copy of which deed is marked Exhibit C, and made a part of the bill, (Vol. I, pp. 126-133 Transcript of Record); that "the purpose, intent and effect of said last described instrument was and is, not to operate as a sale or conveyance of any of the lands granted by said Act of Congress approved May 4, 1870, but to constitute said defendant, Oregon and California Railroad Company, the successor of said West Side Company, to construct, complete and equip the line of railroad aforesaid, and particularly that part thereof extending from Forest Grove to Astoria, and, in aid thereof, to receive and exercise the grants, franchises and other benefits in that behalf extended by Congress, as aforesaid, and upon all of the terms and conditions aforesaid, and not otherwise."

It will be noted that the purpose, intent and effect of this instrument is thus pleaded to avoid its undoubted legal effect, as shown by the instrument, and as supported by the evidence, that it was a sale and transfer of the property of the West Side Company and of all its title to the land granted to it by the Act of Congress of May 4, 1870, for a sufficient and valuable consideration, and that it was a sale,

and transfer *in solido*. It was so pleaded to avoid a breach of the alleged condition subsequent, claimed to be created by Section 4 of the Act of May 4, 1870, which is as follows:

“Section 4. And be it further enacted, That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding Two Dollars and Fifty Cents per acre.” (Vol. I, pp. 30, 31 Transcript of Record) (16 Stat. 94)

It is further alleged in the bill of complaint, that on October 6, 1880, the West Side Company was dissolved, and that at all times thereafter, the Oregon and California Railroad Company has assumed and still assumes to be the “successor” to said West Side Company, and that substantially all transactions subsequent to that date relate to and affect both of the aforesaid grants of land, that of July 25, 1866 being known as the “East Side Grant,” and that of May 4, 1870, being known as the “West Side Grant;” that on May 7, 1881, the financial affairs of the Oregon and California Railroad Company were adjusted in such way as that all of its former capital stock was by its Board of Directors and stockholders, cancelled, the amount of its capital

stock was then established, and at all times since has remained, and still is, \$19,000,000, consisting of \$12,000,000 preferred stock, and \$7,000,000 common stock; that in payment of its then existing indebtedness, with accrued interest thereon, all of the new capital stock was then issued, ever since has been, and still is, outstanding, and “by the issue of said new capital stock, and by the use of a part of the proceeds of a new bond issue heretofore referred to, all of its then existing indebtedness was fully paid and discharged, and the several mortgages and other instruments purporting to secure the same, were canceled and satisfied;” (Vol. I, p. 36 Transcript of Record) that on June 2, 1881, the Oregon and California Railroad Company, (hereinafter called, for convenience, the Oregon Company) executed to Henry Villard, Robert Davie Peebles, and Charles Edward Bretherton, as trustees for the owners and holders of such preferred stock, a certain instrument in writing purporting to convey to said trustees all of the lands of both of said land grants, in trust, to secure the owners of said preferred stock, some pretended rights or interest in or to said lands, and for certain other purposes, as will appear in said instrument, a copy of which is made a part of the bill of complaint, marked Exhibit D, (Vol. I, pp. 134-165 Transcript of Record), and that “said deed of trust last described purports to convey, and purports to authorize said trustees, and their successors, to sell and convey said *lands to persons other than actual settlers, and in quan-*



*tities greater than one quarter section to one purchaser, and for a price exceeding Two Dollars and Fifty Cents per acre, and for purposes other than those prescribed in and by said land grants respectively; and because thereof, and otherwise, said deed of trust was and is in violation and breach of the aforesaid terms, conditions, and provisions of each of said land grants respectively. On or about the 28th day of June, A. D. 1881, said deed of trust was recorded in the office of the County Recorder of Multnomah County, in the State of Oregon, in Book 27 of Mortgages, at page 179; and thereafter, and at about the same time, was recorded in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants.” (Vol. I, p. 37 Transcript of Record)*

This is the first substantive breach of the so-called condition subsequent relied upon by the United States, and pleaded as such.

The complaint further alleges that thereafter such proceedings were had under the deed of trust, that the defendant Stephen T. Gage became and now is, the sole surviving trustee thereunder, and that, individually and as trustee, Gage, and the defendant Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert some right, title, interest or lien in, to, or upon said lands or some part thereof, under said

deed of trust, but that "because of the premises, neither of said defendants has any right, title, interest or lien in, to, or upon any part of said lands;" that by the issuance and negotiation of two separate issues of its corporate bonds, bearing date June 1, 1881, and May 26, 1883, described and known as "First Mortgage Bonds," and "Second Mortgage Bonds," respectively, the Oregon and California Railroad Company provided further construction funds aggregating about \$5,000,000, and in June, 1881, work of constructing the East Side line was resumed, and continued until on or about the month of January, 1884; that during this period of construction, the East Side line was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in Oregon, a distance of approximately 145 miles; that on or about the month of January, 1884, these construction funds became exhausted, the Oregon Company again became bankrupt and insolvent, and the work of construction was again abandoned, and not resumed until April, 1887; that on or about January 19, 1885, the First and Second Mortgage Bonds being still outstanding, in a suit instituted and then pending in the Circuit Court of the United States, for the District of Oregon, wherein certain of the holders of the First Mortgage Bonds were plaintiffs, and the Oregon Company and others, were defendants, the railroad lines and other property of the Oregon Company were placed in the hands of a Receiver, and that about

May 12, 1887, and during the pendency of such receivership, the Southern Pacific Company acquired, and thereafter exercised, ownership and control of the Oregon Company, and "*subsequently, under the direction and influence of said defendant Southern Pacific Company, certain breaches and violations of the terms and conditions of said land grants respectively hereinafter complained of, were committed;*" (Vol. I, p. 39 Transcript of Record); that on and prior to May 12, 1887, the general status of said land grants was as follows, to-wit: under said East Side grant, during the years 1871 to 1877 inclusive, patents for approximately 323,000 acres of land, (being lands contiguous to the first 125 miles of said East Side line) were applied for, by, and issued to, the Oregon and California Railroad Company, as the successor of the East Side Company, and, excepting as stated, no patents under this grant were issued until the year 1893, and no patents were ever issued under the West Side Grant prior to the year 1895; that the total length of the East Side line is approximately 367 miles; that with the exception of the northerly 197 miles thereof, no part of said East Side line was constructed within the times prescribed by the Act of July 25, 1866, and acts amendatory thereof; that on May 12, 1887, the southerly portion thereof, extending from Ashland to the southerly boundary line of the State of Oregon, still remained unconstructed; that of the West Side line, that part extending from Forest Grove to Astoria



was never constructed, and because thereof, the granted lands contiguous to said portion were declared forfeited by Act of Congress of January 31, 1885, (23 Stat. 296); that of the granted lands, approximately 250,000 acres had been sold prior to May 12, 1887, and *“your Orator is informed and believes, and therefore states, that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities, and for prices slightly in excess of the aforesaid limitations prescribed by said land grants respectively,”* (Vol. I, p. 41 Transcript of Record); that on or about the month of January, 1885, a certain railroad syndicate known as the “Southern Pacific System, controlling substantially all railroad lines in the southwestern part of the United States, and particularly on the Pacific Coast south of the State of Oregon, including the Central Pacific Railroad Company, (which had theretofore become the successor to the grants, franchises and other benefits in the State of California, under said Act of Congress approved July 25, 1866) organized, under the laws of Kentucky, the “Southern Pacific Company,” as “a general holding company,” for said syndicate, and on or about the month of March, 1885, the Southern Pacific Company acquired, and ever since has exercised, a controlling interest in each of the corporations constituting said “Southern Pacific System,” and at about the same time, became, and ever since has been, the lessee of each of these corporations, whereby it came into possession of, and at all

times thereafter has operated all of said railroad lines; that several of the constituent companies of said "Southern Pacific System" held lands granted by the United States in aid of the construction of their respective lines, aggregating many millions of acres; that shortly after its organization, the Southern Pacific Company established a general land department, with offices in San Francisco, California, under the charge of a certain official known as its "Land Agent," and thereupon assumed and thereafter exercised, through its Land Agent, control over the handling and disposing of all of the lands of its constituent companies; that shortly after the affairs of the Oregon Company were placed in the hands of a Receiver, the Southern Pacific Company, designing to extend its railroad system, and its land holdings by acquiring ownership and control of the Oregon Company, in that behalf entered into negotiations with the Oregon Company, its bondholders and stockholders, and certain other parties named, and for the purpose thereof, such stockholders became and were organized under the name "Stockholders Committee;" certain owners of the mortgage bonds became and were organized under the name "Frankfort Bondholders Committee," and certain other owners of the bonds became and were organized under the name "London Bondholders Committee," said Bondholders Committees representing the owners of substantially all of the First and Second Mortgage Bonds of the Oregon Company; that on or about March 28, 1887, a contract



in writing was entered into by and between Southern Pacific Company and the Oregon Company, the Union Trust Company, the "Stockholders Committee," the "London Bondholders Committee," the "Frankfort Bondholders Committee," and the Pacific Improvement Company, a copy of which contract is made a part of the bill, marked Exhibit E, (Vol. I, pp. 166-184 Transcript of Record); that by virtue thereof, all of the corporate securities of the Oregon Company were acquired by the Southern Pacific Company; that the general purpose and effect of this contract was such that the Oregon Company, together with its lines of railroad, was absorbed by and merged into said "Southern Pacific System," and the independent corporate existence thereof virtually ceased, "but," *by way of argument and incriminating inducement*, it is alleged that:

"it manifestly appears from the subsequent conduct of said defendant Southern Pacific Company, and your Orator charges and states, that at the time of the negotiation and execution of said last described contract, it was the purpose and design of said defendant Southern Pacific Company to secure control of the aforesaid land grants, and to divert the same from the aforesaid lawful uses and purposes thereof, to the exclusive use, benefit and enrichment of said defendant Southern Pacific Company; and to that end, said last described contract was, by the parties thereto, so conditioned, and the conditions, options and pro-



visions thereof were so exercised and performed, that said defendant Southern Pacific Company did thereafter maintain said defendant Oregon and California Railroad Company a corporation in name and form only, as a mere instrumentality and device, to accomplish, and at the same time to conceal its aforesaid purpose and design, and in that behalf to obtain and dispose of said lands in the name of, and under the guise and pretense of the administration and exercise of the aforesaid land grants, by the defendant Oregon and California Railroad Company; and to that end, certain proceedings were had and transactions entered into, including that certain contract of lease and that certain mortgage deed hereinafter set forth."

(Vol. I, pp. 43-44, Transcript of Record.)

That pursuant to the terms of the contract of May 28, 1887, on or about May 12, 1887, all of the capital stock, and all of the Second Mortgage Bonds of the Oregon Company were transferred, assigned, and delivered to the Pacific Improvement Company, and all of the First Mortgage Bonds transferred, assigned, and delivered to the Southern Pacific Company; that Pacific Improvement Company was a California corporation, wholly owned and controlled and directed by the owners of a majority of the capital stock of the Southern Pacific Company; that Southern Pacific Company was the actual purchaser of the capital stock and said Second Mortgage Bonds, and paid the pur-

chase price therefor, and the Pacific Improvement Company never had any beneficial interest therein, but, under the direction and influence of Southern Pacific Company, it was made a nominal party to the contract of March 28, 1887, "*for the purpose of concealing the true facts in the premises,*" (Vol. I, p. 45 Transcript of Record); that Pacific Improvement Company held the capital stock of the Oregon Company, for the use and benefit of Southern Pacific Company, until on or about April 9, 1901, when all of this stock was transferred to the Southern Pacific Company, which, at all times thereafter, has been and still is the owner and holder thereof; that at all times since May 12, 1887, Southern Pacific Company has controlled and directed the election of directors and officers of the Oregon Company, and the management and conduct of all of its corporate acts, including all transactions and proceedings set forth in the bill of complaint; that pursuant to the contract of March 28, 1887, on or about January 3, 1888, Southern Pacific Company and the Oregon Company entered into a lease bearing date July 1, 1887, whereby all of the railroad and telegraph lines and other property of the Oregon Company were leased to the Southern Pacific Company for the term of forty years, upon certain terms and conditions, a copy of which lease is made a part of the bill, marked Exhibit F, (Vol. I, pp. 185-188 Transcript of Record); that this lease remained in effect until on or about August 1, 1893, when the parties entered into a further lease in

writing, of that date, whereby all the railroad and telegraph lines and other property of the Oregon Company were leased to the Southern Pacific Company for the term of thirty-four years, a copy of which lease is made a part of the bill of complaint, marked Exhibit G, (Vol. I, pp. 189-196 Transcript of Record); that this last named lease has at all times since August 1, 1893, and still is, in full force and effect, and that pursuant to these leases, Southern Pacific Company, on or about June 6, 1888, entered into possession of all the property leased, and at all times thereafter has been and still is in full possession thereof, and engaged in the operation of said lines of railroad, and during all of said times has enjoyed and is still enjoying all the benefits and profits thereof; that pursuant to the contract of March 28, 1887, and "*under the direction and influence*" of Southern Pacific Company, on or about January 3, 1888, the Oregon Company *executed and delivered to the Union Trust Company*, a certain instrument in writing of date July 1, 1887, purporting to mortgage and convey, in trust, to the Union Trust Company, certain property of the Oregon Company, for certain purposes, and upon certain terms and conditions therein expressed, and among others, to secure the payment of certain bonds thereafter to be issued and negotiated in the name of the Oregon Company, a copy of which instrument is made a part of the bill of complaint, marked Exhibit H, (Vol. I, pp. 197-223 Transcript of Record); that by a certain provision



of said instrument, to-wit, "and all the property, real, personal or mixed, which on the 12th day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company," reference was had, and intended to be had, to a certain deed of trust executed by the Oregon Company, of date June 1, 1881, to Henry Villard, Horace White, and Charles Edward Bretherton, as trustees, a copy of which is made a part of the bill of complaint, marked Exhibit I, (Vol. I, pp. 224-259 Transcript of Record); *that on or about January 8, 1888, said mortgage deed bearing date July 1, 1887, was recorded in the office of the County Recorder of Multnomah County, Oregon, in Book 63, at page 437, of the Records of Mortgages, "and thereafter, and about the same time, was recorded in the office of the County Recorders of the several counties in which was situate any part of the lands granted by either of said land grants,"* (Vol. I, p. 48 Transcript of Record); that pursuant thereto, the Oregon Company executed, and the Southern Pacific Company and Union Trust Company negotiated and delivered, certain of the bonds provided for by said mortgage deed bearing date July 1, 1887, of even date therewith, "of which approximately Seventeen Million Five Hundred Thousand Dollars (\$17,500,000) in amount are still outstanding, the exact amount whereof is to your Orator unknown," (Vol. I, p. 49 Transcript of Record); that all of these bonds inured to the exclusive benefit of Southern

Pacific Company, and were used by that company to purchase the securities of the Oregon Company, and *“to complete the construction of, and improve, the lines of railroad leased by it, as aforesaid;”* that by reason of the premises, these bonds “in fact represent and constitute the indebtedness of the defendant Southern Pacific Company,” and “the payment of these bonds, both as to principal and interest, was and is, by endorsement thereon in writing, guaranteed by the Southern Pacific Company;” *“in so far as said mortgage deed bearing date July 1, 1887, relates to any of said granted lands; if at all, it purports to convey, and purports to authorize the defendant Union Trust Company, and its successors, to sell and convey said lands to persons other than actual settlers, and in quantities greater than one-quarter section to one purchaser, and for a price exceeding Two Dollars and Fifty Cents per acre, and for purposes other than those prescribed in and by said land grants respectively, and because of the premises in this bill set forth, said mortgage deed was and is in violation and breach of the aforesaid terms, conditions and provisions of each of said land grants respectively.”* This is the *second substantive breach* of the alleged condition subsequent pleaded and specifically relied upon by the Government.

The bill further alleges that the Union Trust Company, individually and as trustee for the holders and owners of these bonds, claims some right,



title, interest or lien in, to, or upon some of these granted lands, under the mortgage deed of July 1, 1887, but because of the premises, it has no right, title, interest or lien in, to, or upon any of said lands, in its own behalf, or as trustee; that during the year 1887, commencing in the month of April, and ending in the month of December, the last section of said East Side line, extending from Ashland to the southern boundary line of the State of Oregon, was constructed by the Pacific Improvement Company, under some form of contract with the Southern Pacific Company, the particulars whereof "are to your orator unknown, *but in furtherance of its aforesaid purpose and design*;" that about June 6, 1887, the Southern Pacific Company did "*instigate*" and cause the Oregon Company and the Pacific Improvement Company to enter into a certain contract, by the terms of which the Oregon Company agreed to pay for said work of construction in its said bonds thereafter to be issued and guaranteed by the Southern Pacific Company, as set forth in the bill; that in truth and in fact, at the time of the execution of this contract of June 6, 1887, a large part of said work of construction had been performed under some prior contract, as thereafter set forth in the bill of complaint; that on June 6, 1888, the receivership proceedings were dismissed, the Receiver discharged, and all of the First Mortgage and Second Mortgage Bonds, (not including said issue of bonds dated July 1, 1887) together with all mortgages and trust deeds securing the



payment thereof, were cancelled and discharged, and thereupon the Southern Pacific Company entered into the possession of all of the property of the Oregon Company, pursuant to the terms of the lease mentioned; that immediately after June 6, 1888, the Southern Pacific Company, through its land department, assumed, and at all times thereafter has exercised *absolute control* over the disposition and sale of the granted lands of the Oregon Company, conducting all business, however, in the name of the latter company; that "until after the year 1893, there was no marked change in the manner of the disposition of said lands, but in the meantime, and under the direction and *influence* of the defendant Southern Pacific Company, preparations were made for the future *exploitation* of said land grants, to-wit: that on or about the month of June, 1888, a *large force of timber cruisers* and land examiners was organized, and thereafter kept employed until all of said lands had been examined and appraised, and prices fixed thereon, without regard to the limitations prescribed by said land grants, and that as to at least eighty per cent. of all of said granted lands, "the first sale price fixed thereon, and the lowest price for which the same was ever offered for sale, was greatly in excess of the sum of Two Dollars and Fifty Cents per acre," (Vol. I, p. 52 Transcript of Record.)

That during the years 1891 and 1892, "anticipating and *seeking to evade responsibility for the*

*contemplated violations* of the terms and conditions of said grants, and under the direction and influence of the defendant, Southern Pacific Company," the Oregon Company and the Union Trust Company adopted quitclaim form of contracts and conveyances for use in making sales of these lands, and thereafter refused to contract for or give any other form of conveyance except in cases where, by prior contracts, the Oregon Company had obligated itself to do otherwise.

That commencing with about the year 1891, patents were rapidly applied for and obtained. The amount patented under the East Side grant, commencing with the year 1893, aggregated approximately 2,445,000 acres, and the amount patented under the West Side grant, commencing with about the year 1895, aggregated approximately 128,000 acres, being the only patents ever applied for or issued under the West Side grant; that no patents have been issued since the year 1906 under either of said land grants.

That in the meantime the Southern Pacific Company was engaged in developing a market and demand for these lands among "*wealthy land speculators and timbermen*," aided in that behalf by its well-equipped organization therefor, and by an extensive acquaintance previously established by its Land Department in the sale and disposition of its other land holdings; that "a sudden and rapidly increasing demand for said lands in large quantities

and at rapidly increasing prices was developed, commencing with about the year 1894. (Vol. I, p. 53, Transcript of Record.)

That taking advantage of the opportunity "to violate the terms and conditions of said land grant" promoted and developed, as stated, the Oregon Company, under the direction and influence of the Southern Pacific Company, *from about the year 1894, until about January 1, 1903, "sold and disposed of said granted lands in manner and upon terms in violation and breach of the aforesaid terms and conditions of said land grants respectively, and with the sole object of securing the greatest possible financial benefit therefrom; and in that behalf a large quantity of said lands was sold to "speculators" and others than actual settlers, and for speculation and purposes other than actual settlement, and in quantities greatly in excess of one-quarter section to one purchaser, to-wit, in quantities from 1000 to 45,000 acres to a single purchaser, and for prices greatly in excess of \$2.50 per acre, to-wit, for prices from \$5.00 to \$40.00 per acre."* (Vol. I, pp. 53, 54, Transcript of Record.)

That of these granted lands the Oregon Company, in the manner stated, has heretofore made approximately 5306 sales, aggregating approximately 820,000 acres, of which 4930 sales in quantities not exceeding one-quarter section, were made, amounting to 296,000 acres, and of which 376 sales, aggregating 524,000 acres, were made in quantities exceeding one-quarter section.



That "substantially all of said 524,000 acres sold in quantities exceeding a quarter section to one purchaser, as aforesaid, (and a considerable portion of said other lands sold as aforesaid) were sold to "*speculators*" and others than actual settlers and "*for the purpose of speculation*" and not for the purpose of settlement, and for prices greatly in excess of \$2.50 per acre. And of said 524,000 acres sold in quantities exceeding one-quarter section to one purchaser, as aforesaid, approximately 478,000 acres (or about 90% thereof) were sold or conveyed since the year 1897, and of said 478,000 acres approximately 370,000 acres were sold to thirty-eight purchasers in quantities exceeding 2000 acres to each purchaser." (Vol. I, page 54, Transcript of Record.)

That nearly all sales were made by contracts providing for payment of purchase price in from five to ten equal annual installments, and execution of conveyance upon final payment. That although sales were suspended on or about January 1, 1903, many contracts of sale were then pending, as to which the installments falling due had been collected and conveyances executed from time to time down to and including the present, and many of such contracts are still pending.

That of the total sales made approximately 4476 have been fully executed and conveyances given, aggregating approximately 646,000 acres, and approximately 830 executory contracts are still pending, aggregating approximately 174,000 acres.

That a schedule setting forth all these conveyances heretofore made and all pending contracts, separately stated as to each of these land grants, is made a part of the Bill of Complaint, marked Exhibit "J". (Vol. I, pp. 260, 272, Transcript of Record.)

That the complainant is not informed as to the exact time these pending contracts were negotiated or executed or the exact purchase price thereof but is informed and believes and therefore states that all of these pending contracts were negotiated and entered into since January 1, 1898, and prior to January 1, 1903, and that the average purchase price thereof is approximately \$10.00 per acre.

That as between the parties thereto, the mortgage deed of July 1, 1887, to the Union Trust Company, has been treated as a lien upon all of the granted lands unsold on May 12, 1887, and that as to all lands of that class which have been sold since that date, *the Union Trust Company "has received substantially all of the purchase price"* and has joined in the execution of all conveyances, the exact amount of which and the specific application thereof are unknown to complainant, but the complainant alleges that the proceeds of all sales made since May 12, 1887, have inured to the exclusive benefit of the Southern Pacific Company, *"by application in payment of the aforesaid bonds guaranteed by the defendant Southern Pacific Company, or otherwise."*

That in the month of October, 1901, the Southern Pacific Company, with all of its constituent lines, became merged into that certain railroad system known as the "Harriman Lines," which said railroad system at all times thereafter has held "*a monopoly of railroad transportation*" affecting a large part of the United States and particularly in the State of Oregon south of Portland.

That thereupon a Land Department was organized and established at San Francisco to handle and "*exploit and manipulate all of the lands*" of the constituent companies of said "Harriman System", including the land grants of the Oregon Company. That all transactions concerning the last named land grants were conducted in the name of the Oregon Company and sales were continued as before until on or about January 1, 1903, on which date there remained unsold approximately 2,373,000 acres, of which approximately 2,080,000 acres had been theretofore patented, and approximately 293,000 acres of unpatented lands now claimed by the Oregon Company. That approximately 1,800,000 acres are situated southerly from Eugene and constitute nearly one-half, in alternate sections, of all lands within approximately forty miles of said railroad from Eugene to the southerly boundary line of the state, and that only a small portion of said granted lands in that part of the grant has ever been sold. That this property in which these unsold lands are situated was and is "*wholly depend-*



ent for railroad transportation on the railroad lines of the Oregon Company," now operated by the Southern Pacific Company as one of the constituent companies of said "Harriman Lines."

That "since said first day of January, A. D. 1903, and particularly during the last preceding two years" certain persons, exceeding one thousand in number, have severally applied to the Oregon Company to purchase certain of these unsold lands in quantities not exceeding 160 acres to each one of them, said "applicants to purchase intending and desiring to purchase said lands so applied for by them respectively for the purpose of *"actually settling thereupon,"* and making *"a permanent home"* thereof, and several of said applicants to purchase have actually *"settled"* and established a *"permanent home"* upon the lands so applied for by them respectively, and at the time of said applications to purchase, each of said applicants did tender to the defendant, Oregon and California Railroad Company, the sum of \$2.50 for each acre of the lands so applied for, as the purchase price thereof, and in addition to said applications to purchase, a large number of persons are ready and willing to *"settle"* upon said lands and to purchase the same for the purpose of *"actual settlement"* thereupon and of making *"a permanent home"* thereof, in quantities, for the price and upon terms as prescribed by said land grants respectively, but are deterred therefrom by the defendant, Oregon and California Railroad

Company, as hereinafter stated.” (Vol. I, pp. 51, 59, Transcript of Record.)

That notwithstanding the premises, and “in violation and breach of the aforesaid terms and conditions of said land grants respectively,” the Oregon company, under the direction and “*influence*” of the Southern Pacific Company, as one of the constituent companies of said “Harriman Lines,” on or about January 1, 1903, “*withdrew*” from sale all of these unsold lands, and that at all times thereafter has refused and still refuses “to sell any part thereof to “*actual settlers*,” or for the purposes of “*actual settlement*,” or in quantities or for prices as prescribed by the terms of said land grants respectively, or at all; and particularly has at all times refused and still does refuse to entertain any of the aforesaid applications to purchase or to sell any of the lands applied for, as aforesaid, to the persons aforesaid, upon the terms aforesaid, or upon any terms whatsoever.” (Vol. I, pp. 59, 60, Transcript of Record.)

That ever since January 1, 1903, the Oregon Company has not only failed and neglected to encourage or “*promote the settlement*” of said lands or the purchase thereof by “*actual settlers*,” or for the purpose of “*actual settlement*,” but by divers means and methods has at all times “*discouraged, obstructed, forbidden and prevented the settlement thereof*,” or any part thereof, and the purchase

thereof, or any part thereof, "upon the terms prescribed by said land grants, or otherwise, *by actual settlers, or for the purpose of actual settlement.*"

That since January 1, 1903, the Oregon Company has "*assumed*" and now asserts an absolute and unconditional estate in and to these unsold lands, and has attempted and still does attempt to convert its "aforesaid conditional estate into an unconditional estate, in violation and breach of the aforesaid terms and conditions of said land grants." That by reason of the nominal corporate character of the Oregon Company, and the further premises set forth in the Bill of Complaint, the unconditional estate so asserted has inured to the benefit of and has been exercised by the Southern Pacific Company, as one of the constituent companies of said "Harriman Lines;" that "the particular effect of the premises is the same as if all of said unsold lands had been conveyed to the defendant, Southern Pacific Company *for the use and benefit of said railroad syndicate.*"

That by reason of the premises and in violation of the express terms and conditions, as well as the plain intendment of said land grants respectively, all of said unsold lands, and the full value thereof, "*have been converted to the use and benefit of the defendant, Southern Pacific Company, as one of the constituent companies of the said "Harriman Lines,"* and "*a virtual land monopoly*" has been created, and ever since said 1st day of January, 1903, has been maintained, and hereafter will be maintained



*“for the selfish uses and purposes of the defendant,”* Southern Pacific Company, and said “railroad syndicate,” enabling “said railroad syndicate,” among other things, *“to control and restrict commercial and industrial development of the territory tributary to said line of railroad,”* and thereby *“prevent the construction and establishment of competing railroad lines,”* which would naturally be attracted by the increase in production that would attend a normal and unrestricted development of industrial and commercial resources, if said granted lands should be sold to actual settlers and for the purpose of actual settlement pursuant to the terms and conditions of said land grants.” (Vol. I, p. 61, Transcript of Record.)

That because thereof the industrial and commercial development of those portions of the State of Oregon wherein are situated these unsold lands, has been, and will continue to be, seriously retarded if not completely checked; and that the statements made concerning the withdrawal of these lands from sale, the circumstances, purposes and effects thereof, together with the subsequent opportunities to sell said lands to actual settlers and for the purpose of actual settlement, and the conduct of the Oregon Company in relation thereto, except as otherwise specifically stated, apply to each of these land grants.

That a schedule of the unsold lands heretofore patented, is made a part of the Bill of Complaint, marked Exhibit “K”. (Vol. I, pp. 273, 520, Tran-

script of Record.) That none of these unsold lands have ever been reduced to possession or improved in any way, unless by persons claiming to have settled thereupon and seeking to purchase the same, as stated, and that the reasonable present value of these lands exceeds the sum of \$40,000,000.

That none thereof now are, or ever were, necessary to reserve for depots, stations, side tracks, wood sheds, standing ground, or any other needful uses in operating any of said railroad lines, or any part thereof, and no part thereof ever was reserved or used or is now reserved or used or intended to be reserved or used for any of these purposes.

That in addition to the purchase price received, the Oregon Company has received and enjoyed certain other benefits on account of said granted lands, consisting of a large number of contracts of sale which have been forfeited for non-payment of the annual installments falling due, and the installments previously paid have been retained, the exact amount of which is unknown to the complainant, but exceeds \$100,000.00.

That a considerable portion of these granted lands have, from time to time, been leased for certain rentals paid to the Oregon Company, the amount of which is unknown to complainant; that the Oregon Company *"has cut and used large quantities of timber growing upon said lands and has sold large quantities of said timber,"* receiving the considera-

tion therefor, the amount of which exceeds the sum of \$200,000.00, and has received other financial benefits, the particulars of which are unknown to complainant.

That the Oregon Company has repeatedly threatened, and still threatens to, and will unless restrained, sell, contract for sale, convey, or in some manner encumber or impair the title of these unsold lands, "in violation of the terms and conditions of said land grants respectively," and has "*heretofore cut large quantities of the timber growing upon these lands*" and has otherwise committed waste thereupon, and by contract and otherwise has permitted and invited others so to do, and threatens to and will, unless restrained, continue to commit waste upon these lands, and "*particularly as to the timber and other natural products thereof,*" and will continue to permit, contract for, and invite others so to do, to the great and irreparable injury of complainant.

That until the year 1894 there was substantially no demand for said lands except for the purpose of settlement and by persons of limited means able to purchase said lands only in small quantities and at reasonable prices, and nearly all sales were of that character; *that during a large part of said period the Oregon Company "maintained an immigration bureau, engaged in inducing immigration and settlement upon said lands,"* and ostensibly was not otherwise engaged in soliciting or promoting



sales, and that by reason thereof, the occasional violations of the terms and conditions of said land grants occurring during said period, were "*concealed and were generally unknown,*" until ascertained by complainant, as stated.

That "a sudden demand arose for said lands, commencing about the year 1894, among '*wealthy speculators and timber men,*' promoted and developed as aforesaid, and the greater part of the substantial wrongs and violations herein complained of were committed subsequent to that time;" that nearly all of the sales consummated after that time, were made by executory contracts of sale, "*not placed of record,*" and which did not merge into deeds for many years thereafter, and a considerable portion of which are still pending, and that *many* of the conveyances *for excessive quantities* of these lands "*were not placed of record*" until recently, and "*many are still unrecorded.*" In many instances of sales in excessive quantities, the lands were attempted to be conveyed by several deeds, each of which was for a small quantity of land, whereby "*the true facts were concealed.*"

That on or about January 1, 1903, all of said unsold lands were withdrawn from sale, and thereafter converted to certain wrongful and unlawful uses and purposes, as thereinbefore set forth in the Bill of Complaint. "But, *designing to conceal* the premises from your Orator and the general public, the

defendant, Oregon and California Railroad Company, has, from time to time, *falsely and deceitfully* represented that said lands were withdrawn from sale for divers temporary reasons, and with the intention of resuming the sale thereof. An alleged confusion of the records of said Land Department, the alleged destruction of said records during the San Francisco fire, and other similar excuses were successively used *to conceal the true character of said transaction.*”

“That by reason of the premises, the several wrongful and unlawful transactions in this bill complained of, *were concealed from, and wholly unknown* to your Orator until ascertained, as hereinafter stated.” (Vol. I, p. 66, Transcript of Record.)

That on or about February 14, 1907, because of the great injury inflicted upon commercial and industrial conditions, as aforesaid, and it having become manifest that the several aforesaid representations concerning the withdrawal of said lands from sale “*were false,*” the Legislature of the State of Oregon adopted and communicated to complainant a certain memorial charging in general terms, “the true facts in the premises,” a copy whereof is made a part of this bill, marked Exhibit “L”, (Vol. I, pp. 520, 521, Transcript of Record;), whereupon the further issuance of patents was suspended, and an investigation of the subject was instituted by complainant, through its Attorney General, which was

concluded on or about January, 1908, and that thereupon the subject was presented to Congress and thereafter, the Joint Resolution of April 30, 1908, was passed. (35 Stat. 571, Vol. I, pp. 67, 68, Transcript of Record); that pursuant to the provisions of this Joint Resolution, this suit was instituted; that "by reason of the several aforesaid breaches and violations of the aforesaid terms, conditions and provisions of said land grants respectively, certain of said granted lands and certain estates in certain of said granted lands, have been and are forfeited to your Orator, the United States of America, free from any and all right, title, interest, lien or claim of the defendants herein, or any of them, or any one claiming by, through, or under them, or either or any of them, which lands and estates in lands so forfeited are—

(1) All of said unsold lands;

(2) Any and all right, title and interest of any kind or nature whatsoever, vested, contingent, or expectant, if any, of the defendants herein, or either or any of them, in, to, or concerning any of the lands granted. (Vol. I, p. 69, Transcript of Record.)

*That pursuant to the authority and direction contained in said Joint Resolution, complainant does hereby assert title to and does hereby resume the title of all of said lands and estates forfeited, as aforesaid.*

That in addition to the lands and estate in lands above specified, certain of said lands which have



been heretofore sold in violation of the terms and conditions of said land grants, and certain estates therein, likewise have been and are forfeited, but are not included in this suit for reasons following, to-wit:

“The lands disposed of in violation of the terms and conditions of said land grants respectively, as aforesaid, were sold, contracted for sale, or conveyed to a large number of purchasers. Including alleged rights of succession by purchase, conveyance, mortgage, descent, devise, and otherwise, more than three thousand (3,000) persons, firms, and corporations, residing in divers parts of the United States and other parts of the world, now assert some right, title, interest or lien in, to or upon the lands sold, contracted for sale and conveyed in violation of the terms and conditions of said land grants respectively, as aforesaid. The names and places of residence of only a few of said persons, firms and corporations are as yet known to your Orator, and because of the multiplicity and complexity of said transactions, your Orator will be unable to ascertain them in time to include said parties in this suit. Said lands were sold and purchased as aforesaid, and alleged subsequent rights have been acquired therein, under greatly varying circumstances and conditions, and because of the premises, it would be inequitable to attempt to secure an adjudication of the rights of all of said parties by making only a few of them parties defendant as representatives of all thereof. To require the making of all said persons, firms

and corporations parties to this suit, or to otherwise require an adjudication herein of their respective rights in the premises, would indefinitely postpone and ultimately defeat the rights, equities and remedies of your Orator pertaining to said unsold lands, as to which the public interests require a speedy and complete adjudication and enforcement."

That the property described in the mortgage deed of July 1, 1887, (not including any of said granted lands) is of *a value largely in excess of the amount of all of said bonded indebtedness secured thereby*, and is ample security therefor, but complainant expressly denies that any of said granted lands are included in the property described in said mortgage deed, or that the Union Trust Company, as Trustee, or any other person, firm, association, or corporation, has any right, title, interest or lien, in, to, or upon any of said lands by virtue of said mortgage deed.

That pursuant to the rules and regulations of the Department of the Interior, all of the patents were issued and based upon applications in writing, from time to time filed in the appropriate Land Office of the United States by the Oregon Company, as the successor of said East Side Company and said West Side Company, respectively, which said applications contained descriptive lists of the lands so claimed, and for which patents were so applied for, and each of said applications was accompanied and supported by "*a certain affidavit in writing*," signed

and sworn to by a certain agent of the Oregon Company thereto duly authorized, to the effect, among other things, that all of the lands so claimed, and for which patents were so applied for, *were of the character contemplated by the grant under which they were claimed* and for which patents were applied for, as aforesaid, and that "*believing and relying upon the statements contained in said applications and said affidavits,*" complainant issued said patents.

That in making sales of said lands, the Oregon Company has in and by its contracts and conveyances, and particularly prior to June 6, 1898, made certain valuable reservations unto itself, reserving a strip of land one hundred feet wide for right of way and other purposes, and the right to take water needed for the operation of said railroad, and reserving and excepting so much and such parts of said lands as may be mineral lands, other than coal and iron, all of which said reservations are in effect a creation of permanent estates in its own favor, in and to a large part of said granted lands, in violation and breach of the terms and conditions of said land grants respectively, and were and are null and void. But, notwithstanding the premises, the Oregon Company, and each of the other defendants herein, claims some inchoate right, title or interest, in said lands by virtue of said reservations, which said right, title and interest, if any, which is denied, were and are subject to the right of forfeiture in this suit.



That in addition to the several claims of the several defendants specifically mentioned, the defendants and each of them (now cross-complainants herein) claim some right, title, interest, or lien, in, to, or upon some or all of said granted lands, the particulars whereof are unknown to complainant, concerning which a full discovery is sought; and that any and all of such rights, titles, interests, or liens, if any, were and are subject to the right of forfeiture and to the relief sought herein.

That a schedule, accurately setting forth all maps of survey and location filed in the office of the Secretary of the Interior, pursuant to the provisions of said land grants respectively, is made a part of this bill, marked Exhibit "M". (Vol. I, pp. 522, 523, Transcript of Record.)

That a schedule, accurately setting forth the time of the construction and completion of several sections of said railroad and telegraph lines, together with the examination, approval and acceptance thereof, separately stated, is made a part of this bill, marked Exhibit "N", (Vol. I, pp. 524, 525, 526, Transcript of Record); that a schedule, accurately setting forth the quantity of lands patented from time to time under each of said land grants, compiled by years, and separately stated, is made a part of this bill, marked Exhibit "O", (Vol. I, pp. 527, 528, Transcript of Record); that all of said patents were applied for by and issued

to the Oregon Company, as the successor of said East Side and said West Side Companies, respectively; that each of said defendants (now cross-complainants herein) asserts some right, title or interest in or to certain of said unsold lands, and each alleges to have, in good faith, actually settled upon certain of said unsold lands, not exceeding one-quarter section in quantity, with the intention of making a permanent home thereof, and to have applied to the Oregon Company to purchase the same, and to have tendered to the Oregon Company the sum of \$2.50 for each acre applied for, as the purchase price thereof, and the Oregon Company has at all times refused and still refuses to entertain said applications to purchase, and sell or convey to said defendants (now cross-complainants herein), respectively, the land so applied for by them respectively, upon the aforesaid terms or otherwise, and that by reason of the premises alleged by said cross-complainants-defendants herein, respectively, as aforesaid, the truth whereof is unknown to complainant, said defendants, (now cross-complainants herein), severally assert some right, title or interest in or to the lands so applied for by them respectively, and each thereof, has instituted a suit in equity against the defendants, Oregon and California Railroad Company, Stephen T. Gage, and Union Trust Company, to compel a sale and conveyance of the lands so applied for, to said parties, which said suits are still pending, none of which have proceeded to any issue other than exceptions

to certain portions of the several bills in said suits; that the suit instituted by the defendant, Roy W. Minkler, is pending in the Circuit Court of the United States, for the Western District of the State of Washington, and all of the other said suits are pending in the Circuit Court of the United States, for the District of Oregon; that a schedule accurately setting forth, as to each of said suits, the court number thereof, the names of the parties thereto, the date of the institution thereof, and a description of the land involved therein, separately stated as to each of said land grants, is made a part of the Bill of Complaint, marked Exhibit "P", (Vol. I, pp. 529, 537); that unless enjoined, said defendants, (now cross-complainants herein) instituting said suits, will proceed, or attempt to proceed, to some form of final judgment or decree; that each of said suits relates to and materially affects the rights and equities of complainant, and that the rights and equities of complainant, and the relief prayed for herein, relate to and affect all of the alleged rights of said defendants respectively, (now cross-complainants herein); that if said suits shall proceed further, the rights and remedies of complainant will be hindered, obstructed and delayed, if not substantially prejudiced, and that because of a multiplicity of said suits, complainant has made said persons parties defendant in this suit, to the end that further proceedings in each of said suits may be enjoined, and, if the court shall so order,



said parties be permitted to set forth herein their respective claims for adjudication.

The Bill of Complaint concludes with a prayer for judgment and decree—

(1) Adjudging all of said unsold lands, whether patented or unpatented, and the reservations mentioned, to have been forfeited, and that the title has been and “is reverted to and reinvested in”, and that all of said lands and estates in lands are now the property of complainant, and quieting and confirming the title of complainant thereto, and that the defendants and each of them forthwith surrender to complainant, the United States of America, “*full possession and control of said lands and estates in lands, and every part thereof,*” or, if the foregoing relief shall be denied,

(2) Adjudging and decreeing that all of said unsold lands are subject to purchase by, and sale and conveyance to, actual settlers in quantities not exceeding 160 acres or one-quarter section to any one purchaser, and for a price not to exceed \$2.50 per acre, pursuant to the terms and conditions of said land grants respectively; that a receiver or receivers be appointed and invested with the title and possession of said unsold lands, and be authorized and directed “*by such method as the court shall prescribe*”, to offer for sale, and sell and convey said lands to persons of the character, in the quantities, and for the price, as aforesaid, until all of

said lands shall have been sold and disposed of in the manner aforesaid; and providing that during the continuance of the receivership, said receiver be authorized and directed, out of any moneys derived from the sale of any of said lands, to pay any and all proper costs, charges, and expenses for the care and protection of said lands; and the sale and disposition thereof, *“including any and all taxes and assessments, if any, which from time to time are properly chargeable against any unsold lands which may, from time to time, remain unsold and undisposed of,”* and providing for accountings from time to time, and the application and disposition of all moneys and funds which may come into the hands of such receiver from the sale or disposition of said lands, after the payment of all costs, charges and expenses incurred, rendering final accounting and final application and disposition of said moneys and funds in such manner and to such parties as the court shall direct; or, if the foregoing relief shall be denied,

(3) That a mandatory injunction shall be issued, requiring the Oregon Company to offer for sale and sell and convey said unsold lands *“to any bona fide actual settler who may apply to purchase the same in good faith”*, in quantities not exceeding 160 acres or one-quarter section, for the price of \$2.50 per acre, *under such restrictions, in such manner, and by such method as the court shall deem adequate and expedient;* and providing that

any and all persons aggrieved by the refusal or neglect of the Oregon Company to sell said lands to him or them, in conformity with the terms hereof, or who may be in any other manner aggrieved, may hereafter apply to the court at the foot of said decree for the enforcement thereof in his or their behalf; and that unless otherwise provided by the decree, each and all of the defendants, their officers and agents, be enjoined and restrained from making any claim or asserting any right, title, interest or lien, in, to, or upon said lands and estates in lands, or any part thereof, and from in any manner selling or offering to sell, or conveying, or in any other manner disposing of any of said lands or estates in lands, or from negotiating, executing, or recording any document or instrument, or doing any other act or thing which shall in any manner affect the use or title of any of said lands or estates in lands, and from going upon the same, or from cutting, removing, or in any other manner using any of the timber, trees, or other natural products thereof, or committing waste thereupon, or from in any manner using or interfering with any of said lands or estates in lands, or any part thereof; and that defendants, Oregon and California Railroad Company, Southern Pacific Company, and Union Trust Company, account for and pay over to the United States any and all sums which they or either of them may have realized, or in any manner received or obtained, from or by virtue of such sales or conveyances of any of said lands to others than



actual settlers, or in quantities exceeding 160 acres to any one purchaser, or for a price exceeding \$2.50 per acre, together with lawful interest thereon, from the time of the receipt thereof; and that they do forthwith account for and pay over to the complainant any and all sums of money and profits of every name and nature which they or any of them may have realized or obtained from *cutting down or in any other manner using the trees, timber or other natural products of any of said lands*, or in any other manner from the use, occupation, rents, issues, profits, accretions or increments of said lands, or any part thereof, together with interest thereon from the time of the receipt thereof; that during the pendency of this suit, the other defendants, (now cross-complainants herein) be enjoined from proceeding further in their said suits; that pending this suit, the defendants and all persons claiming under them, or either of them, be enjoined from using, occupying, leasing, or in any manner exercising dominion, use, ownership, or occupation of, or in any manner whatsoever interfering with any of said unsold lands, or any part thereof, or from *cutting, removing, selling, or in any manner whatsoever interfering with or impairing the value of any of the trees or timber upon, or other natural products of said lands*, or any part thereof, or from in any manner committing waste upon any of said unsold lands, "*and particularly as to the timber and other natural products thereof*," and from selling, conveying, or offering for sale, and from leasing or

offering to lease, or in any other manner disposing of any of said lands or estates in lands alleged to be forfeited, and from negotiating, executing, or recording any document or instrument, or doing any other act or thing which shall in any manner affect the use or the title of any of said lands or said estates in lands.

The Bill of Complaint concludes with a prayer for full disclosure and discovery, but waives answer under oath.

### *SUMMARY OF THE MATERIAL ALLEGATIONS OF THE BILL OF COMPLAINT.*

Divested of allegations which are clearly immaterial and irrelevant to any proper issue in this case, and which allegations were presumably deemed to be prejudicial to a dispassionate and judicial consideration of the real issues involved, the material allegations of the Bill of Complaint may be narrowed to the following:

FIRST: Citizenship and residence of the parties.

SECOND: Construction of the Acts of Congress of July 25, 1866, June 25, 1868, April 10, 1869, and May 4, 1870.

THIRD: The incorporation of the Oregon Central Railroad Company (West Side) October 6, 1866, with a copy of its Articles of Incorporation and the Joint Resolution of the Legislature of the State of Oregon of October 10, 1866; the Resolution

of the West Side Company of May 25, 1867, assenting to the provisions of the Act of Congress of July 25, 1866, and the filing in the office of the Secretary of the Interior, on July 6, 1867, of an authenticated copy of said Resolution, together with a certified copy of its Articles of Incorporation, and certified copy of the Joint Resolution of October 10, 1866, and the filing of its general map of survey of its projected line of road with the Secretary of the Interior on August 20, 1868.

FOURTH: The incorporation, on April 22, 1867, of the Oregon Central Railroad Company of Salem, (East Side); the passage of the Joint Resolution of October 20, 1868 by the Legislature of the State of Oregon; the adoption of the Resolution of June 8, 1869, by the East Side Company, assenting to the provisions of the Act of July 25, 1866, and of all acts amendatory thereof, and the filing, on June 30, 1869, in the office of the Secretary of the Interior, of a certified copy of this Resolution, and the filing, on October 29, 1869, by the East Side Company, in the office of the Secretary of the Interior, of a map of survey and location of the first sixty miles of its projected line, and that on December 24, 1869, the East Side Company completed construction of the first twenty miles of its line of railroad, commencing at the City of Portland, and that on December 31, 1869, the same was examined and approved by Commissioners appointed therefor pursuant to the provisions of Section 4 of the Act of July 25, 1866.



FIFTH: That the West Side Company wholly failed to complete the construction of any part of its line of railroad pursuant to the terms and conditions of the Act of July 25, 1866, and acts amendatory thereof, and that by an Act of Congress, approved May 4, 1870, there was granted to the Oregon Central Railroad Company of Portland, (West Side Company) the grant of lands as described in said act.

SIXTH: That on March 17, 1870, the Oregon and California Railroad Company was duly incorporated under the laws of Oregon, and by its Articles of Incorporation was to become, and it became, the purchaser of the grants, franchises, and privileges of said Act of Congress of July 25, 1866, and the acts amendatory thereof, and on March 29, 1870, the East Side Company conveyed to the Oregon Company all the property of the East Side Company, including its right, title and interest in and to the grants, franchises and other benefits of the Act of Congress of July 25, 1866, and acts amendatory thereof, which deed was duly recorded during March and April, 1870, in the counties wherein any of the lands or property described therein were situated.

SEVENTH: That on March 29, 1870, the East Side Company was dissolved according to law, and that on April 4, 1870, the Oregon Company adopted a resolution accepting the grant conferred by the Act of Congress of July 25, 1866, and acts amendatory thereof, and directed a certified copy of such

resolution, together with a copy of the deed of conveyance from the Oregon Central Railroad Company to the Oregon Company, to be filed in the office of the Secretary of the Interior, and that on April 28, 1870, the Oregon Company so filed such certified copy of said Resolution, and such certified copy of said deed, and that thereafter the Oregon Company assumed and still assumes to be the owner of all the property formerly owned by the East Side Company, including all of the lands granted, as described in said Act of July 25, 1866, and acts amendatory thereof.

EIGHTH: That on July 2, 1870, the West Side Company adopted a resolution assenting to and accepting the provisions of the Act of Congress of May 4, 1870, and on July 20, 1870, filed in the office of the Secretary of the Interior an authenticated copy thereof.

NINTH: That on August 15, 1870, the original capital stock of both companies was held by a single interest and was continued until the West Side Company was dissolved; that all of the original capital stock of the Oregon Company, and substantially all of the capital stock of the West Side Company was issued without consideration, and that by reason thereof, neither of said companies had any original capital or other funds for construction or other purposes, except such as was borrowed therefor; that the Oregon Company borrowed, upon mortgage, in 1870, \$8,000,000.00 and the West Side

Company borrowed, in 1871, \$1,000,000.00, and with these funds proceeded with construction of road until January, 1873, constructing the East Side line to Roseburg, 197 miles, and the West Side line to McMinnville, 47 miles; that in January, 1873, the construction funds became exhausted, both companies bankrupt, and insolvent, and further construction was abandoned and not resumed as to the East Side line until June, 1881, and as to the West Side line, was never resumed; that because thereof, on July 24, 1874, the creditors of the two companies, under the name "Bondholders Committee," assumed control, and on February 29, 1876, for a nominal consideration, acquired all of the capital stock of both companies; that on October 6, 1880, the West Side company conveyed all of its property, including the lands granted by the Act of Congress, approved May 4, 1870, to the Oregon Company, and thereupon the West Side Company was dissolved.

TENTH: That on May 7, 1881, all of the former capital stock of the Oregon Company was cancelled, the amount of its stock then established, and at all times since, was and is \$19,000,000.00, composed of \$12,000,000.00 preferred stock, and \$7,000,000.00 common stock, and that in payment of its then existing indebtedness, with accrued interest thereon, all of said new capital stock was then issued and ever since has been and still is outstanding, and that by the issuance thereof and by the



use of the proceeds of a further bond issue, the then existing indebtedness of the Oregon Company was fully paid and discharged, and the several mortgages and other instruments securing the same, cancelled and satisfied; that on June 2, 1881, the Oregon Company executed a trust deed to secure the preferred stock holders, which was, on June 28, 1881, duly recorded in the Records of Mortgages of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which any of the granted lands were situated; and that Stephen T. Gage is the sole, surviving Trustee under said trust deed.

ELEVENTH: That under the mortgages of June 1, 1881, and May 26, 1883, the Oregon Company obtained approximately \$5,000,000.00 for construction funds, and in June, 1881, resumed construction of its East Side line, which was continued until the month of January, 1884, extending this line from Roseburg to a point about one and one-quarter miles southerly from Ashland, in Oregon, a distance of 145 miles, and that in January, 1884, the construction funds became exhausted, the Oregon Company bankrupt and insolvent, the work of construction was abandoned, and not resumed until April, 1887; that on or about January 19, 1885, the first and second mortgage bonds being still outstanding, a suit was brought in the Circuit Court of the United States, for the District of Oregon, and the railroad lines and other property of

the Oregon Company were placed in the hands of a receiver; that on May 12, 1887, the Southern Pacific Company became the owner of the capital stock of the Oregon Company, took the title to said stock in the name of the Pacific Improvement Company, and that at that time the condition of the grant, as to patents, the length of mileage constructed, and the disposition of the unearned portion of the grant of May 4, 1870, was as stated in the Bill of Complaint; that prior to May 12, 1887, approximately 250,000 acres of these lands had been sold, and that nearly all thereof were sold to actual settlers in small quantities, although in many instances in quantities and for prices in excess of the limitations prescribed by the said land grants respectively.

TWELFTH: That while the various affairs of the Oregon Company were in the hands of a receiver, the stockholders of the Oregon Company became and were organized under the name "Stockholders Committee;" certain of the bondholders under the name "Frankfort Bondholders Committee"; and certain other bondholders under the name "London Bondholders Committee", representing the owners of substantially all of the first and second mortgage bonds then outstanding; that on March 28, 1887, a preliminary contract was entered into between Southern Pacific Company, the Oregon Company, Union Trust Company, Stockholders Committee, London Bondholders Committee, Frankfort Bondholders Committee, and Pacific Improve-

ment Company, by the terms of which the securities of the Oregon Company were to be acquired by the Southern Pacific Company, and that on or about May 12, 1887, all of the capital stock, and all of the second mortgage bonds of the Oregon Company, were transferred to Pacific Improvement Company, and all of the first mortgage bonds to the Southern Pacific Company, and that on April 9, 1901, the Pacific Improvement Company transferred the capital stock of the Oregon Company to the Southern Pacific Company, which has been ever since, and now is, the owner thereof; that on July 1, 1887, the Oregon Company leased its railroad to the Southern Pacific Company for forty years, which lease was displaced by a subsequent lease of date August 1, 1893, for the term of thirty-four years, now in effect; that on June 6, 1888, the Southern Pacific Company took possession of the property leased and has been ever since, and still is, in full possession thereof, engaged in the operation of the lines of railroad, and enjoying all of the benefits and profits thereof; that on or about January 3, 1888, the Oregon Company executed and delivered to the Union Trust Company its trust deed or mortgage of July 1, 1887, to secure contemplated bond issue, under which bonds are outstanding of the par value of \$17,500,000.00, and which bonds, principal and interest, are guaranteed by Southern Pacific Company, and which mortgage purports to convey, in trust, to the Union Trust Company, the lands granted and then unsold, and which trust deed or



mortgage was duly recorded about January 18, 1888, in the Records of Mortgages of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which any part of the lands granted was situated; that pursuant thereto there was issued, negotiated and sold, bonds to the amount stated.

THIRTEENTH: That during the month of April, 1887, ending in the month of December, the last section of the East Side line from Ashland to the Oregon and California boundary line was constructed by Pacific Improvement Company under contract with Southern Pacific Company, by which the Oregon Company agreed to pay for the work in its bonds; that on June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, all of said first mortgage bonds and said second mortgage bonds, together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged.

FOURTEENTH: That from about 1894 until January 1, 1903, the Oregon Company sold and disposed of said granted lands in violation and breach of the terms and conditions of said land grants, as stated; that on January 1, 1903, there remained unsold of said granted lands approximately 2,373,000 acres, all of which had been theretofore patented excepting 293,000 acres; that since January 1, 1903, and within the last and preceding

two years, certain persons, exceeding one thousand in number, have applied to the Oregon Company to purchase certain of these unsold lands in accordance with the terms and provisions of the Act of Congress, and have been refused, and that these persons were qualified to become, and intended to become, actual settlers within the meaning of these Acts of Congress; that notwithstanding, on January 1, 1903, the Oregon Company withdrew from sale all of these unsold lands and has refused and still refuses to sell any part thereof to actual settlers or for purposes of actual settlement, as provided by these Acts of Congress, claiming to own the title in fee simple; that Congress, pursuant to the memorial of the Legislature of the State of Oregon, adopted February 14, 1907, passed the Joint Resolution of April 30, 1908, and that this suit is prosecuted under said Joint Resolution.

FIFTEENTH: That by reason of the several breaches assigned, the unsold granted lands have been and are forfeited to the United States.

#### CROSS COMPLAINT OF JOHN L. SNYDER, ET AL.

The cross complaint of John L. Snyder and sixty-six others, after alleging the citizenship and residence of the parties, avers as to each one severally, the commencement of his suit in the Circuit Court of the United States, for the District of Oregon,

against the Oregon and California Railroad Company, Union Trust Company and Stephen T. Gage, in which the complainant sought to enforce a specific trust as to the quarter section claimed to have been actually settled upon, and prayed for a decree of specific performance and the execution of a deed conveying the title to the so-called actual settler.

The cross complaint further alleges that each applicant was an actual settler upon the particular tract, and for the bona fide purpose of making the said land his home, and for the purpose of purchasing the land from the Oregon and California Railroad Company at the price of \$2.50 per acre, under the Act of Congress of May 4, 1870, and due tender of such purchase price, the consolidation of said suit with the main suit, an order of court allowing him to file his cross complaint. The cross complaint sets out the Act of May 4, 1870, under which all of the cross-complainants claimed, and that pursuant thereto, the West Side Company duly filed its assent thereto with the Secretary of the Interior, "and the said Oregon Central Railroad Company, for itself and its successors, did thereby and in that manner expressly contract and agree with the United States, among other things, that said Oregon Central Railroad Company would sell all of the lands granted by said Act in quantities as great as and not exceeding 160 acres, or a quarter section to any one settler, and at a price not exceeding \$2.50 per acre, \* \* \* and that said contract was



entered into by and between the United States and said Oregon Central Railroad Company, and its successors, for the benefit of any and all citizens of the United States, who should thereafter actually settle upon said lands."

The cross complaint further alleges construction of road from Portland by way of Forest Grove to McMinnville, in accordance with the Act of Congress; the sale of the property, including the land grant, on October 6, 1880, to the Oregon and California Railroad Company by the West Side Company; the issuance of patents to the latter company; the ownership by that company of the lands specifically described; the interpretation of the act of May 4, 1870, as contended for by the cross-complainants; the tender of the purchase price by each of these so-called actual settlers for each tract of land, and specifically "that from the date of said settlements down to the present time cross-complainants have remained in possession of and occupied and inhabited the said lands above described as their homes, to the exclusion of homes elsewhere, and that it is their bona fide purpose and intention to make said quarter sections of land their homes for the future, and to improve, clear, husband and cultivate the same. That immediately after settling upon said quarter sections of land as aforesaid, cross-complainants erected their dwelling houses thereon, in which they have resided at all times since and are now residing."

That prior to the commencement of each original suit, each complainant "offered to defendant, the Oregon and California Railroad Company, their applications to purchase said quarter sections of land, and each tendered the sum of \$400.00 in United States gold coin, and *each tendered and offered to reimburse defendant for all taxes and disbursements paid out by defendant on account of said lands, in payment for said quarter sections of land, that being \$2.50 per acre therefor.*"

The pleader further alleges refusal of the company to accept the proffered tender; the alleged trusteeship of the company as to these lands; the alleged contention of the company as to its reason for refusing to accept the tenders or make the sales or convey the property; "that said defendant has never at any time been willing to comply with the terms of said Act of Congress of May 4, 1870, by conveying said lands to actual settlers in quantities not exceeding 160 acres, at prices not exceeding \$2.50 per acre."

The cross-complaint alleges the issuance of patents to the amount of 128,616.13 acres, the sale of 49,358.26 acres of these lands for the average price of \$7.00 per acre to certain firms and corporations, and sales in tracts of thousands of acres to single purchasers, and that from such sales defendant received a sum far in excess of \$2.50 per acre for the entire lands patented to it, and all taxes and disbursements paid out by defendant on account of said lands.

DEMURRER OF OREGON AND CALIFORNIA  
RAILROAD COMPANY, SOUTHERN PA-  
CIFIC COMPANY AND STEPHEN T. GAGE,  
INDIVIDUALLY AND AS TRUSTEE, TO  
THE BILL OF COMPLAINT.

The defendants-appellants demurred to the Bill of Complaint, (Vol. II, pp. 677-680, Transcript of Record) upon the following grounds, briefly stated:

(a) That the bill is without equity and cannot be maintained as to either grant, and does not set forth any matter, equity or cause entitling complainant to any discovery as to either grant.

(b) That the bill does not show any matter, equity or cause entitling complainant to any relief as to either grant.

DEMURRER OF OREGON AND CALIFORNIA  
RAILROAD COMPANY, SOUTHERN PA-  
CIFIC COMPANY AND STEPHEN T. GAGE,  
INDIVIDUALLY AND AS TRUSTEE, TO  
THE CROSS COMPLAINT OF JOHN L.  
SNYDER AND OTHERS.

The defendants-appellants demurred to the cross complaint of John L. Snyder and others (Vol. II, pp. 688-691, Transcript of Record) and for cause of demurrer showed:

(a) That the cross complaint fails to show that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of \$2000.00 as to each of the said cross complainants.



(b) That the cross complaint fails to show any matter, equity or cause entitling either of the cross complainants to file or maintain the same.

(c) That the cross complaint fails to show any matter, equity or cause entitling the cross complainants or either of them to any discovery whatsoever, or to any relief whatsoever.

(d) The defendants demurred to so much of said cross complaint upon the same grounds hereinabove stated as is exclusive of sub-division XVIII and preceding same and demurred to sub-division XVIII upon the same grounds hereinabove stated.

DEMURRER OF OREGON AND CALIFORNIA  
RAILROAD COMPANY, SOUTHERN PA-  
CIFIC COMPANY AND STEPHEN T. GAGE,  
INDIVIDUALLY AND AS TRUSTEE, TO  
THE BILL IN INTERVENTION OF B. W.  
NUNALLY AND SEVEN OTHERS, FILED  
BY WAY OF ANSWER AND CROSS COM-  
PLAINT.

The defendants-appellants demurred to the petition in intervention of B. W. Nunally and seven others, filed by way of answer and cross complaint, (Vol. II, pp. 685, 686, Transcript of Record) and upon the grounds that

(a) The said petition in intervention filed by way of answer and cross complaint fails to show that the matter in dispute, as to each or any of said

persons therein named, exceeds, exclusive of interest and costs, the sum or value of \$2000.00.

(b) That the same fails to show any matter, equity or cause entitling said B. W. Nunally, or any other person or persons therein named, to file or maintain the same, or to any discovery or relief whatever.

The court below, on April 24, 1911, (Vol. II, pp. 696, 855, Transcript of Record) announced its opinion and made an order pursuant thereto, overruling the demurrer to the Bill of Complaint and sustaining the demurrer to the cross complaint of John L. Snyder and others, and the demurrer to the petition in intervention filed by way of answer and cross complaint by B. W. Nunally and others, and the same orders as to all other cross complainants and interveners. The cross complainants and interveners declining to plead further, orders of dismissal were entered on July 1, 1913, at the time final decree was entered.

STATEMENT OF THE CASE AS MADE BY  
THE JOINT AND SEVERAL AMENDED  
ANSWER OF THE DEFENDANTS OREGON  
AND CALIFORNIA RAILROAD COMPANY,  
SOUTHERN PACIFIC COMPANY, AND  
STEPHEN T. GAGE, INDIVIDUALLY AND  
AS TRUSTEE.

The joint and several amended answer of the defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T.

Gage, individually and as trustee, admits and denies certain allegations of the bill, and in substance and effect pleads facts tending to show long continued acquiescence upon the part of the United States in these sales as made by the company, tending to show, and showing, that the United States had full knowledge and notice of the alleged breaches of the "actual settler" clause, and that with such knowledge, it acquiesced in such sales; that it waived these alleged breaches by various affirmative acts of legislation and conduct, and that the United States is now estopped to claim that the company has violated the "actual settler" clause, or that any cause for forfeiture has arisen by reason of these sales.

It is admitted that on or about October 6, 1860, proceedings were had by which certain persons attempted to organize, under the general incorporation laws of the State of Oregon, the Oregon Central Railroad Company, (West Side), but it is alleged that the incorporation of this company was not, nor was its organization perfected, until after October 10, 1866, the date when Joint Resolution No. 13, designating the West Side Company, was adopted by the legislature of the State of Oregon. (Vol. II, p. 859, Transcript of Record.) The amended answer denies that the Act of July 25, 1866, prescribed, as a condition precedent to the vesting of any of the grants contained therein, that the company designated by the legislature of Oregon



should file in the Interior Department, within one year thereafter, or at all, its assent to said act, or any terms or conditions thereof, and alleges affirmatively that the Act of July 25, 1866, authorized and empowered the California and Oregon Railway Company and such company (if any) organized under the laws of Oregon as the legislature of that state should designate, *or either of said companies*, to construct the railroad to be constructed between Roseville Junction and Portland, and to earn the grant of lands made in aid thereof, and that under and pursuant to said act, the California and Oregon Railroad Company duly filed its assent to said act, on or about October 8, 1866, and duly completed the first twenty mile section thereof, on or about October 28, 1867, and thereafter, prior to December, 1887, the California and Oregon Railroad Company, (hereinafter known as the California Company) and the Central Pacific Railroad Company, its successor by amalgamation and consolidation, completed the construction of the railroad in California, and aided the Oregon Company to complete its railroad from Ashland, in Oregon, to connection with the California Company, at or near the southern boundary line of Oregon, and that the filing of such assent, and construction *and subsequent acceptance by the United States of the constructed road, constituted full and specific performance of the requirements of said Act of July 25, 1866*, and that none of the provisions of Section 8 of said Act were at any time operative, in whole or in part.

The amended answer denies that the West Side Company did not complete the construction of any part of its line of railroad pursuant to the terms and conditions of the Act of Congress of July 25, 1866, and amendments thereto, or that at any time the West Side Company acquiesced in the substitution of the East Side Company, or that there was any substitution, as alleged, and denies that the West Side Company ever abandoned or waived all or any claim to the grants, privileges or franchises of which the East Side Company became and was the recipient, or that the grant of lands or franchises conferred on said West Side Company by the Act of May 4, 1870, was applied for, obtained, accepted, or made, in lieu of any grant of lands or franchises or benefits provided by the Act of July 25, 1866; denies that no right, title or interest in or to any grants, franchises, or other benefits provided by the Act of July 25, 1866, was ever acquired by or through the West Side Company, or that no right, title or interest in or to any grants, franchises or other benefits provided by said act, were ever acquired by, through, or under the East Side Company, except by virtue of or subject to the terms or conditions of the Act of April 10, 1869, and in this behalf the amended answer alleges that no condition or conditions was or were, expressly or otherwise, imposed by the Act of April 10, 1869, but that all the grants, franchises and other benefits in Oregon, provided by said Act of July 25, 1866, were acquired by the East Side Com-



pany and these defendants, and were so acquired otherwise than by virtue of or subject to any provisions of said Act of April 10, 1869.

The amended answer denies that the principal object of the Oregon Company, in fact, or as stated in its Articles of Incorporation, was, to become *the successor* of the East Side Company, or, as such, to receive or exercise the grants, franchises or privileges of the Act of July 25, 1866, or acts amendatory thereof, but alleges that the *principal object* of the Oregon Company, in fact, and as stated in its Articles of Incorporation, was, *to construct, operate and maintain a railroad and telegraph line from Portland, in Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, to connection on the southern boundary of Oregon, with the railroad and telegraph line then being constructed northerly through California, by the California Company*; denies that the purpose, intent, or effect of the deed of date March 29, 1870, executed by the East Side Company to the Oregon Company, (Exhibit B, of bill of complaint, Vol. I, page 93 Transcript of Record) was to constitute the Oregon Company *the successor* of the East Side Company, to construct, complete or equip the said line of railroad, otherwise than as *grantee by purchase* and under the said deed of conveyance, or that by reason of said instrument, or otherwise, the Oregon Company became or was in any wise obligated by the terms and provisions of the Act of



April 10, 1869, or that the East Side Company became or was dissolved on or about March 29, 1870, or has not exercised any corporate powers or franchises since that date; denies that the West Side Company at any time abandoned or waived all or any claim to any of the grants, franchises or other benefits of the Act of July 25, 1866, or importuned Congress to extend to it, in lieu thereof, or otherwise, or at all, any grant of lands or franchises or other benefits pertaining to its said projected line of railroad known as the West Side line, or that in such behalf, Congress passed the Act approved May 4, 1870; denies that on or about August 15, 1870, or at any time, or at all, all or any of the capital stock of the West Side Company was acquired by the then or any owners of the capital stock of the Oregon Company, or that thereafter, or at any time, or at all, all or any of the capital stock of both said companies was held by a single interest, or that the affairs of the two companies were conducted virtually or at all as a single enterprise, until the dissolution of the West Side Company, or at all, and denies that all of the original capital stock of the Oregon Company, or substantially all of the capital stock of the West Side Company, was issued without consideration, or that by reason thereof, or otherwise, neither of said companies had any original capital or other funds for construction or other purposes, excepting such as was borrowed therefor.

The amended answer denies that further construction of either railroad of the East Side Company or the West Side Company *was abandoned at any time*, and denies that on or about October 6, 1880, the West Side Company became and was dissolved; denies that on or about May 7, 1881, the original capital stock of the Oregon company was cancelled, for the reasons set forth in the bill of complaint; denies that the trust mortgage of June 1, 1881, (Exhibit D, of bill of complaint, Vol. I, page 134, Transcript of Record) was or is in violation or breach of any terms or conditions of each or either of said land grants, and denies that neither of the defendants has any right, title, interest or lien in, to, or upon all or any part of the lands covered by said trust mortgage.

The amended answer denies that on or about May 12, 1887, or during the pendency of the receivership, the Southern Pacific Company acquired, or thereafter exercised, ownership or control of the Oregon Company, excepting that about the year 1901, the Southern Pacific Company acquired certain capital stock of the Oregon Company, and thereafter exercised the ordinary rights and privileges as such stockholder, and denies that during the pendency of such receivership, or at any time, any breach or violation of any condition or conditions of said land grants, or either of them, was or were committed, under the direction or influ-

ence of the Southern Pacific Company, or at all; denies that about the month of January, 1885, or at any time, a certain railroad syndicate known as the "Southern Pacific System," controlled substantially all railroad lines in the southwestern part of the United States, and particularly on the Pacific Coast south of the State of Oregon, including the Central Pacific Railroad Company, or the Southern Pacific Company, as a holding company for said or any syndicate, or that about the month of March, 1885, or at any time, Southern Pacific Company acquired, and ever since has exercised, the controlling or any interest in each of the corporations constituting said "Southern Pacific System," or that at about the same time, or at any time, it became, or ever since has been, the lessee of each of said corporations, whereby it came into possession of, or at all or any times has operated all of said railroad lines, or that several of the constituent companies of the said "Southern Pacific System" held lands granted by the United States in aid of the construction of their respective lines of railroad, aggregating many millions of acres of land, or that there is or ever was such organization or syndicate as the "Southern Pacific System," and denies that shortly after its organization, or at all, it established a general or any land department in San Francisco, California, or elsewhere, or that thereupon or thereafter it assumed or exercised, through its land agent, control over



the handling or disposing of all or any lands of its constituent companies.

The amended answer denies that shortly after the affairs of the Oregon Company were placed in the hands of a Receiver, the Southern Pacific Company, designing to extend its aforesaid or any railroad system, or its aforesaid or any land holdings, by acquiring ownership or control of the Oregon Company, in that behalf or otherwise, entered into negotiations with the Oregon Company, or its bondholders or stockholders, or other parties, and denies that any of said committees was or were organized for any of the purposes set forth in the bill of complaint; denies that by virtue of the contract of March 28, 1887, (Exhibit E, to bill of complaint, Vol. I, page 166 Transcript of Record) or otherwise, all or any corporate securities of the Oregon Company was or were acquired by Southern Pacific Company, or that the general or any purpose or effect thereof was such, that the Oregon Company, or its railroad lines, were absorbed by or merged into said "Southern Pacific System," or that the independent existence of the Oregon Company ceased therewith, or at all, or that it appears from the subsequent conduct of the Southern Pacific Company, or otherwise, or that it is in any wise true, that at the time of the negotiation or execution of said contract, or at any time, it was the purpose or design of the Southern Pacific Company to secure control of

said land grants, or either thereof, or to divert the same from any lawful use or purpose, to the exclusive or any use, benefit or enrichment of the Southern Pacific Company, or at all, or that said contract was so conditioned, or the conditions, options or provisions thereof so exercised or performed that the Southern Pacific Company did thereafter, or at any time, maintain the Oregon Company, a corporation in name or form only, as a mere instrumentality or device, to accomplish or at the same time to conceal its alleged or any purpose or design, or in that behalf, or otherwise, obtain or dispose of said lands, in the name of or under the guise or pretense of administration or exercise of said grants, or either thereof, by the Oregon Company, or that to that end certain or any proceedings were had, or transactions entered into, including the contract or lease or mortgage of July 1, 1887.

The amended answer denies that the Pacific Improvement Company was wholly owned, controlled, or directed by the owners of a majority of the capital stock of the Southern Pacific Company, or that Southern Pacific Company was the actual purchaser of said stock or Second Mortgage Bonds, or any thereof, or paid the purchase price therefor, or any thereof, or that the Pacific Improvement Company never had any beneficial interest therein, or that under the direction or influence of Southern Pacific Company, the Pacific Improvement Company was made a nominal party to said



contract of March 28, 1887, for the purpose of concealing the true facts, but alleges that it was a real, and not in any wise nominal, party to said contract; denies that Pacific Improvement Company held said capital stock of the Oregon Company, or any part thereof, for the use or benefit of the Southern Pacific Company, until on or about April 9, 1901, or at any time, and denies that at all or any times since May 12, 1887, Southern Pacific Company has controlled or directed the election of directors or officers of the Oregon Company, or the management or conduct of the corporate acts of the Oregon Company, including all or any of the transactions or proceedings set forth in the bill of complaint; denies that any proceeds from the sale of the bonds issued pursuant to the mortgage deed of July, 1, 1887, of which approximately \$17,500,000 in amount are still outstanding, were used by the Southern Pacific Company to purchase securities of the Oregon Company, or that said bonds inured to the exclusive or any benefit of the Southern Pacific Company, or that the outstanding bonds in fact or at all represent or constitute the or any indebtedness of the Southern Pacific Company, and denies that said mortgage deed purports to convey or authorize the Union Trust Company to convey the land, or any thereof, thereby conveyed, for any purposes other than those prescribed in and intended by said land grants respectively, and denies that said mortgage deed was or is in violation or breach of any terms or



conditions of each or either of said land grants; denies that the construction or any thereof, of the line of railroad during the year 1887, from a point near Ashland, to the southern boundary line of Oregon, was under some or any form of contract with the Southern Pacific Company, other than the contract of October 11, 1886, copy whereof is attached as Exhibit No. 1, and made a part of the amended answer, (Vol. II, pp. 949-956 Transcript of Record); or that in furtherance of any purpose or design set forth in the bill, or otherwise, or at all, the Southern Pacific Company on or about June 6, 1887, or at any time "*instigated*" or caused the Oregon Company or the Pacific Improvement Company to enter into said contract, except as set forth in said Exhibit No. 1; denies that immediately after June 6, 1888, or at any time, Southern Pacific Company, through its land department, or otherwise, assumed, or at all, or any times thereafter exercised absolute or any control over the disposition or sale of the granted lands of the Oregon Company, or any thereof, or conducted all or any business in the name of the Oregon Company, or otherwise, and alleges that the Southern Pacific Company has not now, nor did it, at any time have a land department, and denies that at any time until the year 1893, or continuously thereafter, or at all, under the direction or influence of the Southern Pacific Company, or at all, preparations were made for future exploitation of the said land grants, or for any examination

or administration thereof, otherwise than by the Oregon Company, in the same, but not in any different manner or way than the said lands had been theretofore exploited, examined and administered by the Oregon Company, and denies that as to at least eighty per cent. of all of said granted lands, the first or any sale price as fixed thereon, or the lowest price for which the same was ever offered for sale, was greatly or at all, in excess of the sum of \$2.50 per acre, or that during the years 1891 and 1892, or at any time, anticipating or seeking to evade responsibility for contemplated violation of any terms or conditions of said grants, or under the direction or influence of Southern Pacific Company, the Oregon Company or Union Trust Company adopted quitclaim form of contracts or conveyances, for use in making sales of said lands, or thereafter refused to contract for or give any other form of conveyance except in execution of formal contracts providing for a different conveyance; denies that between 1893 and 1906, or at any time, the Southern Pacific Company was engaged in developing a market and demand for said lands, among "*wealthy land speculators or timber men*," or at all, aided by its well-equipped organization therefor, or otherwise, or by an extensive or other acquaintance previously established by its, or any, land department, in the sale or disposition of other holdings in the bill of complaint mentioned, or otherwise, or that, taking advantage of the opportunity to violate the



terms or conditions of said land grants, or either thereof, promoted or developed, as alleged in the bill, the Oregon Company, under the direction or influence of the Southern Pacific Company, or otherwise, from about the year 1894 until about January 1, 1903, or at any time, sold or disposed of said granted lands, or any thereof, in manner or upon terms in violation of the terms or conditions of said land grants, or either thereof, or with the sole object of securing the greatest possible financial benefit therefrom, or otherwise, or at all, or, in that behalf, that a large quantity of such land was sold to "*speculators, or others, for speculation,*" or that said lands were sold generally in quantities of 1,000 to 45,000 acres to a single purchaser, at prices from \$5.00 to \$40.00 per acre, or that "nearly all" of the said sales mentioned in the bill of complaint were made by contracts providing for payment of purchase price in from five to ten equal annual installments, and execution of conveyances upon final payment, or that many of said contracts were still pending at the time this suit was brought.

The amended answer denies that the proceeds of all or any sales made since May 12, 1887, or at any time, inured to the exclusive or any benefit of the Southern Pacific Company, by application in payment of the bonds issued under the mortgage of July 1, 1887, or otherwise, except in so far as that by the payment thereof the Southern



Pacific Company was to that extent released of liability as a guarantor; denies that in the month of October, 1901, or at any time, the Southern Pacific Company, with all or any of its constituent lines, became merged in that certain railroad system known as the "Harriman Lines," or that a railroad system known as the "Harriman Lines," at all times thereafter, or at any time, held "a monopoly" of railroad transportation affecting a large or any part of the United States, or particularly or otherwise in the State of Oregon south of Portland, or that thereupon or at any time a land department was organized or established, at San Francisco, or elsewhere, to handle, "exploit, or manipulate" all or any lands of the constituent or any companies of said "Harriman Lines," including both or either of said land grants of the Oregon Company; denies that the territory in which said unsold lands are situated, was or is wholly dependent on the railroad lines of the Oregon Company, now operated by the Southern Pacific Company; denies that the applicants to purchase the quarter sections mentioned in the bill of complaint, or any thereof, intended or desired to purchase the lands so applied for by them, or in their names, respectively, for the purpose of actually settling thereon, or making a permanent or any home thereon, or that several of said applicants had actually settled or established a permanent or any home upon the lands so applied for by them, or in their names, respectively, or that at the time

of said applications to purchase, each of said applicants did actually tender to the Oregon Company the sum of \$2.50 per acre for each acre so applied for, as the purchase price thereof, or that, in addition to said applicants to purchase, a large or any number of persons are ready or willing to *“settle” upon said lands, or to purchase the same for the purpose of actually settling thereon, or of making a permanent or any home thereon,* in quantities not exceeding 160 acres to each person, or for the price of \$2.50 per acre, or upon any terms prescribed by the said land grants, or are deterred therefrom by the Oregon Company, as stated in the bill of complaint, or at all; denies that in violation or breach of any terms or conditions of said land grants, or either of them, respectively, the Oregon Company, under the direction or influence of the Southern Pacific Company, as one of the constituent companies of said *“Harriman Lines,”* or otherwise, on or about January 1, 1903, or at any time, withdrew from sale all or any of said unsold lands, or that at all times thereafter, the Oregon Company *has refused or still refuses to sell any part thereof to actual settlers, or for purposes of actual settlement,* or in any quantities, or for prices as prescribed by any terms of said land grants, or either of them, or at all, and denies that ever since January 1, 1903, or at any time, the Oregon Company has failed or neglected to encourage or promote the settlement of any of said lands which are susceptible

to settlement, for the establishment of homes thereon, or the purchase thereof by actual settlers for the purpose of actual settlement, or that by divers or any means or methods, the Oregon Company has at all or any times discouraged, obstructed, forbidden, or prevented the settlement of any of said lands which are susceptible of settlement, or the purchase thereof or any part thereof upon terms prescribed by the said land grants, or either thereof, by actual settlers, or for the purpose of actual settlement; denies that the Oregon Company at any time attempted or is attempting to convert any conditional estate into an unconditional estate, in violation or breach of any terms or conditions of the said land grants, or at all, or that by reason of any nominal character of the Oregon Company, or of any other premises set forth in the bill of complaint, or at all, the unconditional estate in the lands so asserted and claimed by and in the name of the Oregon Company, has inured to the benefit of, or has been exercised by the Southern Pacific Company, as one of the constituent companies of the said "Harriman Lines," or otherwise, or that the practical or any effect of the premises is the same as if all or any part of said unsold lands had been conveyed to the Southern Pacific Company for the use or benefit of said (so-called) "Railroad Syndicate," or otherwise, or that by virtue of the premises, or in violation of the express terms or conditions, as well as the plain or any intendment



of the said land grants, respectively, or otherwise, all or any of the said unsold lands, or the full or any value thereof has or have been converted to the use or benefit of the Southern Pacific Company, as one of the constituent companies of the (so-called) "Harriman Lines," or otherwise, or that a virtual or any "*land monopoly*" has been created, or ever since January 1, 1903, or at any time, has been maintained, or hereafter will be maintained for the selfish or any uses or purposes of the Southern Pacific Company or said (so-called) "Railroad Syndicate" or otherwise, enabling said (so-called) "Railroad Syndicate," among other things, or at all, to control or restrict commercial or industrial development of the territory tributary to said line of railroad, or otherwise, or thereby prevent the construction or establishment of competing railroad lines which would naturally or otherwise be attracted by the increase in production that would attend a normal or unrestricted development of industrial or commercial resources if said granted land should be sold to actual settlers, or for the purpose of actual settlement, pursuant to any terms or conditions of said land grants, or otherwise, or that because of the premises, or otherwise, the industrial or commercial or any development of those portions of the State of Oregon wherein are situated said unsold lands, or any part thereof, has been or will continue to be seriously, or at all, retarded or completely, or otherwise, checked.

The amended answer denies that none of said unsold lands have ever been reduced to possession, or in any way improved, unless it be, by persons claiming to have settled thereupon, or seeking to purchase the same, as in the bill of complaint stated, or that the reasonable present value of said unsold lands exceeds the sum of \$40,000,000. The amended answer alleges:

“That the defendant Oregon and California Railroad Company has at all times since the year 1870, been and still is in open and notorious possession of and dominion over the said lands, as follows: ‘The said Company has at all said times openly and notoriously claimed, and prior to about the time of the commencement of this suit was recognized as and admitted by all to be such owner thereof; has, at all times, openly and publicly mortgaged, leased and offered for sale, the said lands; has at all times, caused the said lands to be protected by field-agents who traveled over and protected the same against depredation and waste; has, at all times paid the taxes levied and assessed upon and against the said lands—which payments amount, in all, to \$1,827,234.10; and in divers other ways has openly and notoriously proclaimed and asserted, and been in, possession of, the said lands. Besides, large and different portions of said lands have been reduced to possession and improved, from year to year, by persons holding leases thereof for grazing and other purposes, from the defendant Oregon and California Railroad

Company; and other large portions of the said lands have been reduced to possession as right of way, station grounds, depot grounds, and the like, for the railroad purposes of the defendant Oregon and California Railroad Company, as is hereinafter more particularly shown." (Vol. II. pp. 912, 913 Transcript of Record)

The amended answer denies that none of said unsold lands are now or ever were necessary to reserve for depots, stations, side-tracks, wood-sheds, standing ground, or any other needful uses in operating any of said railroad lines or any part thereof, or that no part thereof ever was reserved or used, or is now reserved or used, or is intended to be reserved or used, for any of said purposes; denies that in divers or any other ways, the Oregon Company has received or enjoyed financial benefit on account of said granted lands, the particulars concerning which are known or unknown to the complainant, or that any allegation or statement made in subdivision X, of the bill of complaint, contrary to or contradictory of the statement contained in paragraph X, of said amended answer, is true, wholly or in part, *but alleges that from April 1, 1870, to April 30, 1911, the total amounts received by the Oregon Company, and disbursed by that Company, from and in the sale and disposition of the lands of these grants, were \$4,368,360.70 received from sale of lands, from sale of timber on lands, and from timber depredation settlements;*



\$1,119,660.02, for forfeitures under contracts, for interest on contracts, and for land leases, aggregating in all \$5,488,020.72, and the sum of \$3,011,776.94 has been disbursed for taxes on lands, stationery and printing, surveys, and office expenses, United States surveying, grading lands, law expenses, and advertising, leaving a net balance of \$2,476,243.78 from April 1, 1870, to April 30, 1911, applicable to aid in construction of said railroads, or in redemption of bonds issued to obtain construction funds, or to redeem indebtedness on account of construction of said roads. (Vol. II, pp. 914, 915 Transcript of Record)

The amended answer denies that the Oregon Company has repeatedly threatened, or threatened at all, or still threatens, to, or will unless restrained therefrom, sell, contract for sale, or in any manner encumber or impair the title of said unsold lands, or any part thereof, in violation of any terms or conditions of the said land grants, or either of them, or that it has heretofore cut *large or any quantities of timber growing on said unsold lands*, or has otherwise committed waste thereon, or, by contract or otherwise, has permitted or invited others so to do, except as accounted for in said paragraph X of said amended answer, or that said Oregon Company threatens to, or will unless restrained therefrom by this court, continue to commit waste on said unsold lands, or any thereof, or *particularly as*

*to the timber or any products thereof, or will continue to permit, contract for, or invite others so to do, to the great or irreparable or any injury of complainant in the premises; denies that a sudden demand arose for said lands, commencing about 1894, among "wealthy speculators or timber men", or that nearly all or that any excepting a few, of the sales consummated after that time, were made by executory contracts of sale, which were not placed of record, or which did not merge into deeds, for many years thereafter, or otherwise than shortly thereafter, or that a considerable or other than a small portion thereof, are still pending, or that any conveyances for excessive quantities of said land were not placed of record until recently, except as to a few, or that many are still unrecorded, excepting a few thereof, or that in any instances all sales in excessive quantities (that term being understood herein to mean quantities in excess of 160 acres) the lands were conveyed or attempted to be conveyed by several deeds, each for a small quantity of land, or that thereby the true facts were concealed, or that any such or any device of concealment was resorted to, or that the said lands, or any thereof, were on or about January 1, 1903, or at any time, converted to certain or any wrongful or unlawful uses or purposes set forth in the bill of complaint, or at all, or that, designing to conceal the premises from complainant, or the general public, or at all, the Oregon Company from time to time, or at all, falsely or deceitfully represented that said lands*

were withdrawn from sale for divers or other temporary reasons, or with the intention of resuming the sale thereof, or that the alleged confusion of the records of the land department, or the alleged destruction of the said records during the San Francisco fire, or other similar or any *excuses* were used successively, or at all, *to conceal the true character* of said transaction, or that by reason of the premises, or otherwise or at all, the several or any transactions characterized in the bill of complaint as or in fact wrongful or unlawful, *were concealed from or unknown to complainant*, until ascertained as stated in the bill of complaint,

“and in this behalf they say that all of said transactions were open and notorious, and many if not all thereof actually known to complainant at the times thereof, respectively, or soon thereafter, and complainant also had constructive notice of all or substantially all of the said transactions at or about the times thereof, respectively, commencing as early as March 1870, and continuously thereafter to the present time. They say that complainant at all times acquiesced in all, and in many instances expressly approved and ratified certain, of the said transactions; a few of the many instances of such acquiescence, approval and ratification, other than those hereinbefore and hereinafter set forth, are shown by ‘Exhibit No. 9’ and ‘Exhibit No. 10,’ hereto attached and made a part of this answer. \* \* \* \* and by ‘Exhibit A’ attached to and made a part of this amendment.”

(Vol. II, p. 921, Transcript of Record)



EXHIBIT A, referred to and made a part of the amended answer, is a succinct statement taken from "Reports of Oregon & California Railroad Company to Auditor of Railroad Accounts of the Interior Department, and official Report thereof by Secretary of Interior to Congress as printed in the Annual Report of 'Executive Documents' and 'House Documents,' showing the average and maximum price received from the sale, and asked for the unsold lands of the said Railroad Company's land-grant lands, during each year from 1879 to 1903, inclusive," and showing under appropriate columns, for that period, "Land Sold, average price, received per acre, and maximum price received per acre; Lands Unsold, average price asked per acre, and maximum price asked per acre," giving volume and page of such Executive and House Documents, and showing that the *average price received* per acre for the year ending 1879, was \$2.39 per acre, for the year 1884, \$2.73 per acre; for the year 1885, \$2.73 per acre; for the year 1886, \$2.99 per acre; for the first half of 1887, \$3.19 per acre, and for the last half of 1887, \$3.40 per acre; for the year 1889, \$4.96 per acre; for the year 1890, \$6.32 per acre; for the year 1892, \$5.61 per acre; for the year 1896, \$3.57 per acre; for the year 1898, \$3.95 per acre; for the year 1900, \$5.02 per acre; for the year 1901, \$5.35 per acre; for the year 1902, \$7.85 per acre, and for the year 1903, \$4.22 per acre, and that the *maximum price received* per acre during the second half of the year 1879, was \$15.00 per

acre; for the first half of 1881, \$10.00 per acre; for the second half of 1882, \$15.00 per acre; for all of the years 1883, 1884, 1885, 1886, down to and including 1890, \$15.00 per acre; for the years 1892 to 1903, both inclusive, \$30.00 per acre; that for the second half of 1879, the *maximum price asked* per acre was \$7.00, and ranged from \$7.00 up to \$25.00 per acre for the year 1894, and from 1895 up to and including 1902, the maximum price asked per acre ranged from \$15.00 to \$20.00 per acre.

The amended answer admits that Exhibit L, (Vol. I, p. 520 Transcript of Record) is a correct copy of the Memorial passed by the legislature of Oregon on or about February 14, 1907, but alleges *that it does not purport to and does not disclose any concealments made, or said to have been made, by the Oregon Company, and did not and could not have given complainant notice of any of the transactions characterized in the bill of complaint as "concealed from and wholly unknown to" complainant; denies that the said Memorial was made because of any injury inflicted upon the commercial or industrial conditions of the State of Oregon, or because of its having become manifest, or its being in any wise true, that any representations made by the Oregon Company were false, and in this behalf alleges: "That the said Memorial was imposed and procured to be passed by the Oregon Legislature by a few influential politicians for interests personal to themselves and other*

*persons, the facts respecting which are not disclosed therein, nor by the bill.*" While admitting that Congress passed the Joint Resolution of April 30, 1908, in pursuance of and influenced by this Memorial, and that this suit was instituted pursuant thereto, the amended answer says:

"But in making this admission they do not concede, or admit, but on the contrary deny, that this is a suit brought in accordance with the provisions of the said Joint Resolution, or intent of Congress in adopting said Joint Resolution, or is one that the Attorney General has authority to bring in this Court under or in pursuance of the said Joint Resolution, or at all; and they deny that the bill presents or shows any cause of suit or action which may be properly considered by a Court of Equity."

The amended answer denies that because of the several or any breaches or violations of any terms, conditions or provisions of the said land grants respectively, or either of them, or at all, certain or any of the said granted lands or estates therein, have been or are forfeited to the United States, free from any or all right, title, interest, lien or claim of the defendants, or persons claiming by, through, or under them, or any of them, or otherwise, or at all; denies that the United States does by the bill in this case, assert title to lands, and estates in lands described in the bill, by reason of alleged forfeiture thereof unto the United States, and says



that the assertion so made has no foundation in fact, nor authority in law, and denies that the United States has resumed, or has lawful authority to resume, title to all or any of the said lands or interest in lands, pursuant to said resolution of April 30, 1908, by the filing of the bill of complaint, or otherwise, and thereupon alleges:

“Upon advice of counsel which they believe to be correct, that were it in anywise true in fact or law, that the said lands or any thereof, or any interest therein, had or have become forfeited unto the United States for breach or violation of some or any condition in grant, the United States has a speedy, adequate and complete remedy at law respecting the same, and no question of fact as to such forfeiture can be enquired into or found, nor can such forfeiture be in anywise enforced, by this Court. Wherefore, these defendants, reasserting their demurrer for no equity shown by the bill, and denying especially the jurisdiction of this Court to hear or determine this cause in so far as it is, or purports to be, a suit to ascertain, determine, or enforce a forfeiture, file this answer upon protest, and protesting against this Court’s jurisdiction submit to trial because they must, under this Court’s ruling on demurrer.”

The amended answer denies that any estates or interests in lands other than the said unsold lands described or referred to in the bill of complaint, have been sold in violation of any terms or conditions of said land grants, or either thereof, or

that any estate or interest therein which has or have been forfeited to the United States is not included in this suit, because sold, contracted for sale, or disposed of in violation of any terms or conditions of said land grants, or otherwise, or at all, to a large or any number of persons, or because such transactions or any thereof, include alleged or any rights of succession by purchase, conveyance, mortgage, descent, device, or otherwise, of more than 3,000 or any number of persons, firms or corporations residing in divers or any parts of the United States or other parts of the world, who or which now assert or have some right, title, interest or lien in, to, or upon any lands sold, contracted for sale, or conveyed in violation of the or any terms or conditions of the said land grants, or either of them; denies all other allegations of the bill of complaint in respect to the reasons why these persons have not been made parties to this suit.

The amended answer denies that the property described in the mortgage deed of July 1, 1887, (which includes the unsold lands belonging to these grants which remained unsold on May 12, 1887, together with the railroad of the Oregon Company) exclusive of the said lands exceeds in value the amount of said bonded debt, or was ample security therefor at the time the said mortgage deed was given, or at any time prior thereto; denies that the patents applied for and issued to the Oregon Company, or any of

them, was or were issued solely because of statements or affidavits made by the agent or agents of the Oregon Company, or the belief of any officers of the United States therein, but aver that the said patents, and all thereof, were duly issued pursuant to the records of the local and general land offices of the United States, and pursuant to due and diligent inquiry, investigation, report and determination by the proper officers of the United States, as to the true facts and particulars in that behalf which authorized and made it the duty of said officers to issue the said patents, under and pursuant to the provisions of the said Acts of July 25, 1866, and May 4, 1870, respectively; denies that the reservations or any thereof, referred to in paragraph XVII of the bill of complaint, creates a permanent estate or permanent estates in favor of the Oregon Company, or these defendants, in or to a large or any part of said granted lands, in violation or breach of any terms or conditions of the said land grants, or either thereof, or that these reservations are, or either thereof is, in any wise null or void; that the ownership, or any right, title or interest therein claimed by the Oregon Company, or Union Trust Company, is subject to any right of forfeiture or right or remedy of complainant set forth in the bill of complaint, or otherwise.

The defendants plead as affirmative defenses in the amended answer, the following: "These defendants say, that from the time of the making of said



grants of land to the East Side Company and West Side Company, owned by the defendant Oregon and California Railroad Company since 1870 as to the East Side grant and since 1880 as to the West Side grant, about forty years has elapsed during which the United States has had actual and constructive notice, as hereinbefore set forth, of sales of lands thereof in quantities in excess of 160 acres to one purchaser other than an actual settler, at prices in excess of \$2.50 per acre; during all of which time the United States, as hereinbefore stated, remained silent and apparently acquiesced in such sales.

“During all of said time the United States has accepted and approved the said railroads as constructed, and has demanded and accepted (since as well as at all times before commencement of this suit) the free use and benefit of the said railroads in the transportation of troops and munitions of war, of the approximate total value of \$1,000,000.

“Because of the said acceptance, approval and use of the said railroads, and relying on the acquiescence of the United States in such sales, the defendant Oregon and California Railroad Company has paid taxes on the said unsold lands to the amount of \$1,827,234.10, as aforesaid, and the other costs and expenses set forth in subdivision “X” hereof, including the payment of \$145,977.26 unto the United States for the costs of surveying and patenting of the said lands; no part of any of which sums has been paid, repaid or tendered to these defendants, or any of them.

"And because of the said acceptance, approval and use of the said railroads, and reliance on the said acquiescence of the United States, the defendant Southern Pacific Company guaranteed the payment of (approximately) \$17,500,000 in bonds still outstanding, issued and sold under the Trust Mortgage of July 1st, 1887, covering the said lands, as hereinbefore set forth."

(Vol. II, pp. 935, 936 Transcript of Record)

"These defendants say that any and all causes of suit or action set forth in the bill are barred as follows:

(a) By section 391 of Lord's Oregon Laws.

(b) By section 8 of the Act of Congress approved March 3rd, 1891, entitled, "An Act to amend section 8 of an Act approved March 3rd, 1891, entitled, 'An Act to repeal Timber-culture laws, and for other purposes,'" published in Vol. XXVI, U. S. Statutes at Large, page 1093.

(c) By the first section of the Act of Congress approved March 2nd, 1896, entitled, "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," published in Vol. XXIX, U. S. Statutes at Large, page 42.

(d) By acquiescence, and laches, of complainant.

(Amendment allowed by leave of court, April 28, 1913, as follows:

"That during all the times mentioned in the bill of complaint, and particularly from and after the 20th day of May, 1872, down to

April 30, 1908, the United States well knew that the Oregon and California Railroad Company, and its predecessors in interest, had continuously and uniformly claimed to own said land grants in fee simple without any condition as to the sale of said lands, and as earned by construction of said roads, and had sold, mortgaged and conveyed the same to secure funds for the construction of said roads, and to refund said indebtedness for said construction funds, by the execution of certain of the mortgages described in said bill of complaint, and other mortgages, and the negotiation and sale of bonds issued thereunder, and that the said present outstanding stock of the said Oregon and California Railroad Company was issued and delivered to the owners and holders of the mortgage bonds issued and sold under said mortgage of April 15, 1870, and in satisfaction of said mortgage, and that the proceeds of said bonds were used in the construction of the first 198 miles of the East Side road and of said 47½ miles of said West Side road, and the United States during all said time from May 20, 1872, down to April 30, 1908, well knew the way and manner in which said Oregon and California Railroad Company continuously and uniformly was administering and had administered said landgrants, and was selling and had sold said land granted by said Acts of Congress, and during all said times well knew that said company was selling and had sold said lands so sold by it without any particular regard to the alleged limitations or re-



strictions of said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, except in so far as the same may be construed to apply to actual settlers upon any of said lands prior to completion of the separate sections of said roads and the acceptance thereof by the United States as provided by said Act of July 25, 1866, and said Act of May 4, 1870, and the direction of the President to issue patents for the lands so earned, and that notwithstanding such knowledge during all said time, between May 20, 1872, and April 30, 1908, of all said matters, and of all the matters and things alleged in the bill of complaint as pretended breaches of the provisions of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, and notwithstanding such knowledge during all said time of all the matters and things alleged in the Joint and Several Answer of the defendants, as heretofore filed and amended, the United States, from said May 20, 1872, to April 30, 1908, asserted no claim of any breach, made no objection to the execution of said deeds, mortgages or conveyances, or to any action of the company in respect to the administration of said grants, or either of them, or the sale of any lands thereby granted, and in no wise asserted any claim that the company was at any time misconstruing said acts, or either thereof, or in any way was violating or had violated said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, but on the contrary the United States permitted and allowed the company to mortgage said lands to secure said construction

funds so borrowed and used, as aforesaid, and permitted and allowed the company to expend large sums of money in surveying fees, and other fees paid to the United States, and to expend large sums of money in taxes upon said lands, and in advertising said lands for sale, and in examining, cruising and grading said lands as timber lands, and also large sums of money in completing said railroad in the first instance from Portland to Roseburg, Oregon, and next in extending the same from Roseburg to Ashland, Oregon, and finally in completing the same to the Oregon and California State line, and also in completing said railroad from Portland to McMinnville, Oregon, and during all said times the United States exacted from said company, and said company furnished, the free transportation of the troops and property of the United States, as required by said Act of July 25, 1866, at the cost and expense of said company, aggregating a sum in excess of \$600,000.00; that relying upon the acquiescence and action of the United States, as aforesaid, the Oregon and California Railroad Company expended all said sums, as aforesaid, incurred all said liabilities, and so mortgaged, sold and conveyed said lands, claiming to own the same in fee simple without any condition; applied for, accepted and placed of record all the patents issued by the United States for such lands, and so sold and conveyed to purchasers such portions of said granted lands as alleged in said bill of complaint, and has applied the proceeds of said sales, and of all sales of said lands, to the redemption

of said bonds so issued to secure said construction funds: That on the 31st day of July, 1885, the Oregon and California Railroad Company and Central Pacific Railroad Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit No. 9 to the Stipulation as to the Facts on file herein, and which is made a part hereof, and to which reference is made as if the same were fully written herein; and on October 11, 1886, said Central Pacific Railroad Company, the Pacific Improvement Company, and the Southern Pacific Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit No. 1 to the Joint and Several Answer of the defendants herein, and which is made a part hereof, and to which reference is made as if the same were fully written herein; and on March 28, 1887, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the London Bondholders' Committee, the Frankfort Bondholders' Committee, the Southern Pacific Company, and the Union Trust Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit "E" to the bill of complaint, and which is made a part hereof, and to which reference is made as if the same were fully written herein, and thereafter the parties to all said agreements, relying upon the said ac-



quiescence and action of the United States, as aforesaid, consummated, carried out and performed said several agreements, and in pursuance thereof, and in reliance upon said acquiescence and action of the United States, as aforesaid, the said Oregon and California Railroad Company executed and delivered, on January 3, 1888, its said mortgage and trust deed of date July 1, 1887, to the Union Trust Company, and issued and delivered its bonds thereunder to the amount of \$20,000,000.00, and said Southern Pacific Company, being the owner of all the stock of the Central Pacific Railroad Company, caused said Pacific Improvement Company and the Central Pacific Railroad Company to purchase the said stock of the Oregon and California Railroad Company for its benefit, and otherwise carried out said agreements, and then and there guaranteed to pay the principal and interest of all said bonds so issued and to be issued by said Oregon and California Railroad Company; that in reliance upon said acquiescence and action of the United States, as aforesaid, the Southern Pacific Company thereby purchased and became the owner of all said stock of the Oregon and California Railroad Company and assumed the debts and liabilities of the Oregon and California Railroad Company and caused said railroad to be constructed to the Oregon and California state line, and thereby guaranteed to pay all said bonds, principal and interest, and became the beneficial owner of all said granted lands then unsold, and but for said acquiescence and action of the United States, as aforesaid, said

Southern Pacific Company would not have purchased said stock nor assumed said debts and liabilities nor caused said road to be constructed to completion nor guaranteed said bonds, principal or interest, and the Oregon and California Railroad Company would have been unable to sell or dispose of its railroad or said land grants, or either of them, or completed said railroad, as required by said Act of Congress, and its creditors would have been compelled to foreclose said existing mortgage securing the then outstanding bonds, and sell all said property, to the great injury and loss of said company and its creditors, and to the great injury and loss of the United States. That the United States, from July 31, 1885, up to April 30, 1908, and during all said time, well knew of the existence of all of said agreements, including the said mortgage of date July 1, 1887, and of the purpose and intention of all the parties thereto, and of all the matters and things hereinbefore set out, and notwithstanding such knowledge during all of said time from July 31, 1885, to April 30, 1908, and of all the matters and things alleged in the bill of complaint as pretended breaches of the provisions of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, asserted no claim of any breach, made no objection to the execution or performance of either of said contracts or of the execution of said mortgage of date July 1, 1887, or to any action of the Oregon and California Railroad Company in respect to the administration of said grants, or either of them, or the sale of the lands thereby grant-

ed, and in no wise asserted any claim that the company was at any time misconstruing said acts, or either of them, or was in any way violating or had violated said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870.

“That from time to time the United States caused to be enacted divers and various statutes affecting said Act of July 25, 1866, as amended April 10, 1869, and said Act of May 4, 1870, some of which are the Act of May 3, 1879, (20 Stat. 472) by which homestead settlers on the even sections within the limits of said grant, could enter 160 acres instead of 80 acres; the Timber and Stone Act of June 3, 1878, (20 Stat. 89) by which the lands of the United States in the even sections within the limits of the grant, could be purchased at \$2.50 per acre, in quantities of 160 acres, without any settlement, by any citizen, or any person who had declared his intention to become a citizen of the United States; and the Act of March 3, 1891, (26 Stat. 1097) by which the pre-emption laws were repealed; and the Act of June 4, 1897, (30 Stat. 1136) by which lands owned by any one within forest reserves of the United States could be reconveyed to the United States, and thereby exchanged for the even sections within the limits of said grants, without any settlement thereon; and the Act of February 10, 1909, (35 Stat. 639); and the Act of June 17, 1910, (36 Stat. 531); and the Act of June 6, 1912, (37 Stat. 123), all amending the Homestead Act of May 20, 1862, (12 Stat. 392); that said statutes and the due adminis-



tration of the same, as applied to the character and class of lands involved in this suit, which are chiefly valuable for timber and are unfit for settlement, and all lands belonging to the company now unsold, have prevented the company from further compliance with the provisions of said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, than as alleged in the bill of complaint.

“That on August 20, 1912, Congress passed an Act, Public No. 278, H. R. 22002, approved that date, entitled, “An Act supplementing the Joint Resolution of Congress, approved April 30, 1908, entitled, ‘Joint Resolution instructing the Attorney General to institute certain proceedings, etc.,’ ” whereby the United States, in substance and effect, waived the alleged breaches of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, as to all the lands described in the bill of complaint and now owned by the Oregon and California Railroad Company, and particularly as to all said lands sold to persons other than actual settlers, in quantities of 1000 acres or more, and aggregating about 400,000 acres, and particularly described in forty-five suits brought by the United States against said purchasers, and these defendants, in this court, to which said suits and the proceedings therein, reference is here made as if the same were fully written herein and made a part hereof, and whereby the United States has agreed to convey by patent all said lands to said so-called innocent purchasers in said suits for \$2.50 per acre, and whereby the United States has so waived said

alleged breaches and so agreed to sell and convey said lands because said lands are and were at the time of such sales so made by the company, unfit for settlement or cultivation and not adapted to entry or settlement under the settlement laws of the United States or under said Act of April 10, 1869, or Section 4 of said Act of May 4, 1870, and because said lands are and were at the time of such sales, chiefly valuable for timber. That but for the said acquiescence and action of the United States, as aforesaid, said Oregon and California Railroad Company would not have expended said sums, as aforesaid, or otherwise done as it has done, as aforesaid. And the defendants therefore say and allege that by reason of all the matters, things and acts hereinafter set out, and by reason of the matters and things in the premises, alleged in their said Joint and Several Answer, as heretofore amended and now herein amended, the United States has fully, effectually and finally exercised and waived any and all right it may have had at any time to claim or assert forfeiture of any lands of the said grants, and is and of right ought to be estopped from having or asserting any such or any claim of forfeiture. These defendants further say, that by reason of the matters, things and premises aforesaid, and by reason of the passage by Congress of the Act approved January 31st, 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," made a part of this Answer by reference to it as published in Vol. XXIII,

U. S. Statutes at Large, page 296, and the passage by Congress of the Act approved September 29th, 1890, entitled, "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," made part of this Answer by reference to it as published in Vol. XXVI, U. S. Statutes at Large, page 496 and following, the United States fully and finally exercised and waived any and all right it may have had to claim or assert forfeiture of any lands of the said East Side grant or West Side grant, and is thereby estopped from having or asserting any such claim or forfeiture."

(Vol. II, pp. 936-946 Transcript of Record)

The case being at issue by the filing of replications to the Joint and Several Amended Answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and to the amended answer of the Union Trust Company, testimony was taken on behalf of the parties, which testimony will be found in "Statement of the Evidence," (Vol. IV, p. 1551, to and including Vol. XV, p. 7920, Transcript of Record) and contained therein, by literal copy, are all the exhibits offered or admitted on behalf of the United States, all the oral testimony offered or admitted on behalf of either party, and a literal copy of many of the exhibits offered and admitted on behalf of the defendants. Volume XVIII comprises the photographic exhibits known



as Defendants' Exhibits 267 to 270 both inclusive, 273, 274, 313, 367, 371, and Government's Exhibit 124, with the description of each, as deduced from the testimony of the witnesses. The exhibits named, offered and admitted on behalf of the defendants, show the timber and non-settlement character of a portion of these lands involved in suit, and claimed to have been "settled" upon by the so-called "actual settlers," some of whom are known in this record as cross-complainants herein. Some of these photographic exhibits show other lands involved in suit, applied for by that numerous class known in this record as "*potential or possible actual settlers*," and called herein "interveners," and others of said photographic exhibits show the *general timber and non-settlement character of the lands involved in suit*.

### THE CASE MADE BY THE EVIDENCE.

On January 3, 1913, complainant and the defendants-appellants, reserving the right to introduce further and additional evidence, agreed upon and filed in the cause, as a part of the evidence, a "Stipulation as to the Facts," (Vol. IV, pp. 1552, 1731, Transcript of Record,) which may be summarized as follows:

The Articles of Incorporation of the Oregon Central Railroad Company of Portland, (Vol. IV, pp. 1625, 1626, Transcript of Record,) were presented to the Secretary of State on October 6, 1866, by

Joseph Gaston, who requested the Secretary to file the same and permit him (Gaston) to immediately withdraw them for exhibition to the Legislature of Oregon, then in session, whereupon the Secretary wrote with a lead pencil the date, October 6, 1866, on the back thereof, or on an envelope containing the same, and Gaston immediately departed with the document and envelope in his possession. They were not returned to the office of the Secretary of State until November 21, 1866, when they were filed in the office of the Secretary of State on that date at 10½ o'clock A. M. At the time they were presented to the Secretary, as stated, no certificate or certificates of acknowledgment were appended thereto, and the only signatures thereto were those of J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer and H. W. Corbett. When returned to the office of the Secretary on November 21, 1866, they were in the form shown in Volume IV, pages 1625, 1628, both inclusive, Transcript of Record, from which it appears that M. M. Melvin signed and acknowledged the Articles on October 23, 1866, George L. Woods on November 10, 1866, R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, and C. H. Lewis on November 16, 1866, and that B. F. Brown, Thomas H. Cox and Joseph Gaston signed and acknowledged the same on November 20, 1866. The Legislature, in 1866, met on the 10th day of September, 1866, and adjourned on the 20th day of October, 1866. The Articles were filed November 21, 1866.

The Oregon Central Railroad Company (West Side) projected its railroad line from Portland by way of Forest Grove and thence southerly to and beyond McMinnville, on the westerly side of the Willamette River. On October 6, 1866, the Legislative Assembly adopted, and the Governor approved, Joint House Resolution No. 13, attempting to designate the West Side Company as the company entitled to receive the benefits of the Act of Congress of July 25, 1866, (Vol. I, pp. 14, 15, Transcript of Record). On May 25, 1867, the West Side Company adopted a resolution assenting to this Act of Congress, and on July 6, 1867, filed a certified copy thereof in the office of the Secretary of the Interior, with a certified copy of its Articles of Incorporation, and of said Joint Resolution of the Legislative Assembly, and on August 20, 1868, filed in the Department of the Interior a map of survey of its projected line of railroad, a copy whereof, on a reduced scale, is set out in Volume IV, page 1629, Transcript of Record. The Articles of the Oregon Central Railroad Company of Salem, (East Side) were filed in the office of the Secretary of State on April 22, 1867, and on or about that date the incorporators, contending that the West Side Company was never lawfully incorporated or organized, and designing to secure the benefits of the Act of Congress of July 25, 1866, caused proceedings to be taken which were intended to organize the company under the General Incorporation Laws of the State of Oregon, on that date, a copy of



which Articles of Incorporation are set out in Volume IV, pages 1630, 1632, Transcript of Record. The East Side Company projected its railroad line on the easterly side of the Willamette River, and in furtherance of its design to secure the benefit of the Act of July 25, 1866, procured the Legislature of the State of Oregon to adopt and the Governor to approve, on October 20, 1868, the Joint Resolution, (Vol. I, pp. 17, 18, Transcript of Record) attempting to rescind House Joint Resolution No. 13, adopted October 10, 1866, and attempting to designate the East Side Company as the company to receive the benefits of the grant of the Act of Congress of July 25, 1866. A controversy arose between the West Side Company and the East Side Company as to which of these companies was entitled to the benefit of the Act of Congress of July 25, 1866, which continued until about January, 1870. The Act of July 25, 1866, is set out in Volume I, pages 6, 13; the Act of June 25, 1868, is set out in Volume I, pages 13, 14; the Act of April 10, 1869, is set out in Volume I, pages 20, 21; the Act of May 4, 1870, is set out in Volume I, pages 28, 32, Transcript of Record. On June 8, 1869, (Vol. I, pp. 21, 22, 23, Transcript of Record) the East Side Company adopted a resolution accepting the benefits of the Act of July 25, 1866, and all acts amendatory thereof, and assented thereto, and on June 30, 1869, filed a certified copy thereof in the Department of the Interior, and on October 29, 1869, filed in the office of the Secretary of the

Interior a map of the survey and location of the first sixty miles of its projected line of railroad, extending southerly from Portland, and on December 4, 1869, completed the construction of the first twenty miles thereof, commencing at Portland and extending southerly therefrom, and on December 31, 1869, this section of constructed road was approved by Commissioners appointed pursuant to the provisions of Section 4 of the Act of Congress of July 25, 1866, who had theretofore examined the same. On March 17, 1870, the Oregon and California Railroad Company was incorporated, a copy of the Articles of which are set out in Volume I, pages 90, 92, Transcript of Record, and these Articles were filed on that date in the office of the Secretary of the State of Oregon, and they were executed and filed in triplicate,—one in the office of the Secretary of State, one in the office of the County Clerk of Multnomah County, Oregon, being the county in which the principal office of the company was located, and one in the office of the Secretary of the company at Portland, Multnomah County, Oregon. On March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company a deed, copy of which is set out in Volume I, pages 93, 125, Transcript of Record, which was recorded in the office of the County Recorder of the several counties in which any part of the lands intended to be granted by the Act of Congress of July 25, 1866, was situated. This deed, for the consideration stated there-

in, purports to grant, bargain, sell, alien, assign, transfer, set over, enfeoff, convey, deliver and confirm to the Oregon and California Railroad Company, its then constructed railroad of twenty miles in length, with any extensions then under construction, together with all its other property of every kind, "and also and especially all the lands, rights, titles, franchises, interests, claims, property and demand whatsoever, both legal and equitable, present and prospective, absolute and contingent, which the Oregon Central Railroad Company \* \* \* now has, owns, or possesses, or to which it is now of right entitled, legally or equitably, or to which it may at any time hereafter become entitled, in and to the franchise and grant of lands made by the Congress of the United States to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," by the Act of July 25, 1866, and amendments thereto, and "also the lands included in such grant, and all the right, title and interest which the party of the first part now has to the same, hereby giving, granting and assigning unto said party of the second part all the right, title, interest and claim which the party of the first part now has in or to the lands, franchises, property, benefits, and emoluments granted or entitled to be granted by virtue of the Act of Congress, aforesaid, and the acts amendatory thereof or supplemental thereto; also all the right, title and franchise which the party of the first part has for



any purpose whatever by virtue of any act or resolution of the Legislature of the State of Oregon, or judgment or decree of any court, either state or federal."

On April 4, 1870, the Oregon and California Railroad Company adopted a resolution, (Vol. I, pp. 26, 27, Transcript of Record) reciting its purchase of, and assignment from, the East Side Company of the property mentioned, and accepting the grant conferred by such of Act of Congress, and directing that an assent of the company be filed in the office of the Secretary of the Interior by filing a certified copy of the resolution and a copy of the deed of March 29, 1870, and on April 28, 1870, such certified copies were filed in the office of the Secretary of the Interior, and at all times since March 29, 1870, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Acts of Congress; by the words "Oregon Central" in the Act of May 4, 1870, Congress intended to and did refer to the West Side Company. On July 2, 1870, the West Side Company assented to an acceptance of the provisions of the Act of May 4, 1870, and on July 20, 1870, filed its assent in the office of the Secretary of the Interior. On October 6, 1880, as proceeds of negotiations or pledge of mortgage bonds, the Oregon and California Railroad Com-

pany, during the year 1870, procured approximately \$8,000,000.00, and during 1871, the West Side Company, in the same way, procured approximately \$1,000,000.00 and with these funds the work of constructing the lines of railroad contemplated by the Acts of Congress of July 25, 1866, and May 4, 1870, respectively, was prosecuted continuously until about January, 1873. During the years 1871 and 1872, with the funds procured by it in 1870, the Oregon and California Railroad Company completed the construction of the East Side railroad from the point at which the East Side Company had quit the work, twenty miles south of Portland, to a point near Roseburg, a distance of approximately 197 miles, and the West Side Company, with the funds procured by it in 1871, completed construction of its railroad from Portland to McMinnville, by way of Forest Grove, a distance of approximately 47 miles. About January, 1873, these funds became exhausted and because thereof further construction of each of these railroads was at that time discontinued, and was not resumed by the Oregon and California Railroad Company until about June, 1881, and was never resumed by the West Side Company. On or about July 24, 1874, the direction and control of the financial affairs of the two companies were assumed, and thereafter exercised, by the creditors thereof, organized under the name "Bondholders' Committee," which, on or about February 29, 1876, acquired all capital stock of both companies, and thereafter, and until on or about June 1, 1881, the

affairs of the two companies were conducted by and under the control of the Bondholders' Committee. On October 6, 1880, the West Side Company executed and delivered to the Oregon and California Railroad Company a deed, a correct copy of which is set out in Volume I, pages 126, 133, Transcript of Record, whereby the West Side Company purports to convey to the Oregon and California Railroad Company, for the consideration stated, all its property of every kind, including the railroad constructed from Portland to St. Joseph, Yamhill County, Oregon, and also "all its lands not heretofore conveyed by it, acquired and which it shall hereafter acquire or to which it is entitled under and pursuant to the provisions of the Act of Congress," of May 4, 1870. A certified copy of this deed was filed with the Secretary of the Interior on or about October 20, 1880, and at all times since October 6, 1880, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all the franchises, rights and property granted or intended to be granted by the Act of Congress, approved May 4, 1870. On or about May 7, 1881, all of the capital stock of the Oregon and California Railroad Company was, by action of its Board of Directors and stockholders, cancelled, and the amount of its capital stock then was established at, has ever since remained, and still is of the total par value of \$19,000,000.00, consisting of \$12,000,000.00 preferred



stock, and \$7,000,000.00 common stock, and in payment of its then existing indebtedness, with accrued interest thereon, all of said new capital stock was then issued, ever since has been, and still is outstanding. By the issuance thereof and use of a part of the proceeds of this bond issue in 1870, above mentioned, all of its indebtedness then existing was fully paid and discharged, and the several mortgages and other instruments purporting to secure the same, were cancelled and satisfied. On June 2, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as trustees for the owners and holders of the preferred stock, a trust deed, a copy of which is set out in Volume I, pages 134, 165, Transcript of Record, which trust deed purports to convey to said trustees, for the purposes stated therein, all the property of the Oregon and California Railroad Company and particularly "also all lands granted by the United States in aid of the construction of the said railroads already completed between the termini aforesaid, and not yet sold, estimated to be in amount about 1,900,000 acres, and all other lands now or which may be hereafter granted to said company by the United States and which lands are intended to be more particularly identified as the same are patented by the United States \* \* \*."

The trust deed describes the railroad mileage conveyed as being constructed and in operation between East Portland and Roseburg, Portland and Corval-

lis, and Albany and Lebanon, and as intending to cover "the Pacific extension thereof from Forest Grove to Astoria," all in accordance with the Act of Congress of May 4, 1870, and the extension from Corvallis to Junction, and the southerly extension thereof from Roseburg to California, to a junction with the Central Pacific, in accordance with the Act of Congress of July 25, 1866. This trust deed, on or about June 28, 1881, was recorded in the office of the County Recorder of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants, and thereafter such proceedings were had, under the same, that the defendant, Stephen T. Gage, became and now is the sole, surviving trustee thereunder, and the said Stephen T. Gage, as such trustee, and the defendant, Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert a lien upon the said lands under said trust deed.

The Oregon and California Railroad Company, by negotiation of two separate issues of its corporate bonds of date June 1, 1881, and May 6, 1883, respectively, known as "First Mortgage Bonds" and "Second Mortgage Bonds" respectively, provided approximately \$5,000,000.00 further construction funds, and on or about June 1, 1881, the work of constructing the East Side railroad was resumed

and thereafter continued until about January, 1884. During that time the road was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately 145 miles. About January, 1884, these construction funds became exhausted and the work of further construction was discontinued until about April, 1887, when it was resumed. About January 19, 1885, these last-mentioned bonds being outstanding, in a suit brought in the United States Circuit Court for the District of Oregon, by certain holders of the First Mortgage Bonds, against the company and other parties, the railroads and other property of the company were placed in the hands of a receiver then and in that suit appointed for that purpose.

On May 12, 1887, during the years 1871 to 1877, inclusive, under the East Side grant, patents for 323,078.68 acres of land (being lands contiguous to the first 125 miles of the East Side railroad) were applied for by and issued to the company, and, except as stated, no patents under the East Side grant were issued until the year 1893, and none under the West Side grant prior to the year 1895.

The total length of the East Side railroad is approximately 367 miles. With the exception of the northerly 197 miles thereof, no part of the East Side railroad was constructed within the times prescribed therefor; on May 12, 1887, the portion of



the East Side railroad extending from Ashland to the southerly boundary line of the State of Oregon, remained unconstructed. That part of the West Side railroad from Forest Grove to Astoria, was never constructed, and because thereof, the granted lands contiguous to the unconstructed railroad were forfeited by Act of Congress approved Jan. 31, 1885. The company sold, prior to May 12, 1887, of its granted lands, 163,430.28 acres. Nearly all of the lands were sold to actual settlers in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and for prices slightly in excess of \$2.50 per acre.

The Southern Pacific Company was incorporated by an Act of the General Assembly of the State of Kentucky, entitled, "An Act to incorporate the Southern Pacific Company," approved March 17, 1884, which act was amended March 21, 1888. Copies of these two acts are set out in Volume IV, pages 1633, 1639, Transcript of Record.

A copy of Articles of Association, Amalgamation and Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, filed in the office of the Secretary of State of the State of California on June 23, 1870, amalgamating and consolidating said companies into the Central Pacific Railroad Company, incorporated as such by the said Articles, is set out

in Volume IV, pages 1640, 1651, Transcript of Record. A copy of Articles of Amalgamation and Consolidation between the Central Pacific Railroad Company and the California and Oregon Railroad Company and the other railroad companies therein mentioned, filed in the office of the Secretary of State of the State of California on August 22, 1870, is set out in Volume IV, pages 1652, 1662, Transcript of Record. On August 22, 1870, at the time the Articles of Amalgamation and Consolidation, just mentioned, were filed, the Central Pacific Railroad Company was the owner of all unsold lands west of a point near Ogden, in Utah, co-terminous with its railroad from Ogden by way of Elko and Reno, in Nevada, Colfax, Auburn, Sacramento, Stockton, Niles and San Jose to San Francisco, in California, granted by the Act of Congress approved July 1, 1862, (12 Stat. 489) as amended July 2, 1864, (13 Stat. 356) and the California and Oregon Railroad Company was the owner of all unsold lands in California granted by the Act of Congress of July 25, 1866, (14 Stat. 239). From August 22, 1899, until July 29, 1899, the Central Pacific Railroad Company remained the owner of all lands of the three several land grants mentioned, which were unsold at that date, and were not thereafter, from time to time, prior to July 29, 1899, sold by the Central Pacific. On July 29, 1899, the Central Pacific Railroad Company conveyed to the Central Pacific Railway Company, all of said land grants remaining unsold on that date, a copy of which deed

is set out in Volume 4, pages 1663, 1678, Transcript of Record. The Central Pacific Railway Company was incorporated under the laws of the State of Utah by Articles of Association of date July 26, 1899, a copy of which Articles of Association is set out in Volume 4, pages 1679, 1696. On February 17, 1885, an agreement was entered into between the Central Pacific Railroad Company and the Southern Pacific Company by which the former leased to the latter its railroad from Ogden to San Francisco and branch thereof from Roseville Junction to Delta, together with certain other railroads and property therein described, and pursuant to which the Southern Pacific Company has held possession of the railroads and other property therein described and operated the said railroads, as such lessee, continuously since February 17, 1885, and still continues to so operate the same. A copy of this agreement is set out in Volume II, pages 957, 967, Transcript of Record, and it recites that a part of the through business heretofore done by the Central Pacific Railroad Company, running from Ogden to the waters of the Pacific, has been diverted by the Northern Pacific, Atlantic & Pacific, and Atchison, Topeka & Santa Fe railroads, and that the Union Pacific Railroad Company has secured the control of the road known as the Oregon Short Line and thereby secured an outlet to the Pacific other than over the Central Pacific Railroad, and thus in that respect placed itself in opposition to the interests of the Central Pacific Railroad Com-



pany; and further recites that it now appears that the through business hitherto done by the Central Pacific Railroad Company will thereby be further diverted and that it is not only to the best interests of, but absolutely necessary, that the Central Pacific Railroad Company, in order to maintain itself against these diversions, should be operated in connection with a friendly through line to the waters of the Atlantic; and further recites that the Southern Pacific Company has a line of railroad under its control, for a period of ninety-nine years, extending continuously from the Pacific Ocean to the Atlantic Ocean, and that the lines of each company are doing a large local traffic, and it is important to both that the same should be conducted in harmony. It further recites that "to accomplish the purposes aforesaid, in consideration of the premises and of the mutual promises herein, the Central Pacific Railroad Company hereby leases to the said Southern Pacific Company for the term of ninety-nine years from the first day of April, A. D. 1885, the whole of its railroad \* \* \*."

On July 1, 1887, the Oregon and California Railroad Company executed a lease to the Southern Pacific Company of all of its railroad lines and appurtenances (but not other property) for the term of forty years, upon the terms therein stated, a copy of which is set out in Volume 1, pages 185, 188, Transcript of Record. Under this lease, the Southern Pacific Company has held possession of and operated

its railroads, as such lessee, continuously from June 6, 1888, until August 1, 1893, when it executed to the Southern Pacific Company another lease of the same property, pursuant to which the Southern Pacific Company has held possession of and operated the said railroads continuously from August 1, 1893, to the present time, and still continues to so hold possession of and operate the same, a copy of which is set out in Volume 1, pages 189, 196, Transcript of Record.

On January 1, 1888, the Central Pacific Railroad Company leased its railroad from Delta to the northern boundary line of the State of California, to the Southern Pacific Company, pursuant to which that company has held possession of and operated said railroad, as such lessee, continuously since that date, and still continues to so operate the same, a copy of which is set out in Volume II, Pages 3968, 3970, Transcript of Record. This lease recites that since the date of the execution of the agreement of February 17, 1885, above mentioned, the lines of the Central Pacific Railroad Company have been extended from Delta, California, to the boundary line between Oregon and California, forming, at the last-mentioned point, a connection with the line of railroad of the Oregon and California Railroad Company, and since the execution of the lease of February 17, 1885, and on or about December, 1887, the line of railroad to the boundary line between the States of California and Oregon, constituting part of the

line from San Francisco, California, to Portland, Oregon, has been delivered by the Central Pacific Railroad Company to the Southern Pacific Company for operation, and for that reason a modification of the previous lease of February 17, 1885, became necessary. On or about December, 1867, the principal stockholders of the Central Pacific Railroad Company of California became the principal stockholders of the California and Oregon Railroad Company, and on or about August 1, 1899, the Southern Pacific Company became, and ever since remained and still is, the principal stockholder of the Central Pacific Railroad Company. On or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railway Company; on or about April 9, 1901, the Southern Pacific Company became, has ever since remained, and still is the principal stockholder of the Oregon and California Railroad Company. On July 31, 1885, the Oregon and California Railroad Company and the Central Pacific Railroad Company made an agreement, in writing, a copy of which is set out in Volume IV, pages 1689, 1696, Transcript of Record, by which the Oregon and California Railroad Company agreed to sell and transfer to the appointee of the Central Pacific Railroad Company, all its railway lines extending from East Portland to about one and one-half miles south of Ashland and from Portland to Corvallis and from Albany to Lebanon, about 451 miles in length, with



other appurtenances, and its lands remaining unsold at that date, and its rights and interests in lands, and rights to acquire and earn lands, and all its rights, grants and franchises granted by the United States, and all its interests of every description in the Northern Pacific Terminal Company for \$8,000,000.00 par value of the shares of the Central Pacific Railroad Company, and \$10,500,000.00 par value of the bonds made or guaranteed by the Central Pacific Railroad Company, to be secured on the property purchased. The agreement was to be void unless the stockholders of the Oregon and California Railroad Company, within two months from its date, should ratify the same, and the two committees known as the "London Bondholders Committee" and the "Frankfort Bondholders Committee" should, within the same time, execute in due form, a confirmation and acceptance thereof. On October 11, 1886, the Central Pacific Railroad Company and the Pacific Improvement Company, organized under the laws of the State of California in 1878, and the Southern Pacific Company, entered into an agreement, a copy of which is set out in Volume II, pages 949, 956, Transcript of Record, wherein it is recited that there was about 104 miles of the line between Roseville Junction and the southern boundary line of Oregon, contemplated by the Act of Congress of July 25, 1866, that had not been constructed, and that the Oregon and California Railroad Company had been in an embarrassed condition and unable to complete

its road, to the northern boundary line of California, and that until the whole of that line is completed, making a through connection between Portland, in Oregon, and the City of San Francisco, in California, no part of the line could be advantageously or profitably operated, "nor the Act of Congress in relation thereto be carried into effect according to the spirit and intent thereof, towit, the construction and maintenance of a continuous railroad between the said cities, which the Government of the United States may use for the transportation of its property, troops, and munitions of war, when necessary, and to aid in the construction of which has granted quantities of the public lands;" and further recites that the completion by the Central Pacific Railroad Company of its own road to the southern boundary line of Oregon without assurance of the completion of that portion of the road from Portland to said boundary line would be a waste of money, the road having to be constructed through a rugged and mountainous country at great expense and without sustaining local traffic; and further recites that it was of the greatest importance to the Central Pacific Railroad Company that it should have an opening into Oregon both for local traffic and the through business of the two cities, and also to furnish business for its entire line from Ogden "for the purpose of completing its said road and securing the completion of the road between the California state line and Portland, Oregon, thus making a through line between said cities of Port-

land and San Francisco and a connection with the Union Pacific Railroad at Ogden, and in order to secure the business of the northern portion of the State of California, and as much as possible of the business of the State of Oregon, and to bring such business to its line from Ogden, and for the purpose and with the intent of carrying into effect the provisions of said Act of Congress," agreed with the Pacific Improvement Company that the latter company should construct, finish, furnish and complete the 104 miles of railroad from Delta to the Oregon-California boundary line, to connect with the road of the Oregon and California Company, with all rolling stock and appurtenances, within a time stated, for the consideration stated. The Pacific Improvement Company agreed that it would, within a reasonable time, and as soon as it could be done to advantage, obtain possession and control of the Oregon and California Railroad, or would purchase the whole of, or a majority of the capital stock of the Oregon and California Railroad Company, and would, within a reasonable time, complete its line of railroad to connection with the Central Pacific Railroad at a point on the boundary line between California and Oregon; the Southern Pacific Company agreed that it would accept a lease of the railroad thus constructed and acquired and pay a rental stated; the Pacific Improvement Company was to receive, as compensation for work and for its purchase of the properties of the Oregon and California Railroad Company, 80,000 shares of the



capital stock of the Central Pacific, and in addition \$4,500,000.00 in mortgage bonds to be issued by the Central Pacific Railroad Company and to be secured by its first mortgage, to be used towards the construction of its railroad between Roseville Junction and the Oregon state line. Prior to the execution of the agreement of July 31, 1885, and October 11, 1886, the stockholders of the Oregon and California Railroad Company became and were organized under the name "Stockholders Committee," certain owners of the First and Second Mortgage Bonds outstanding became and were organized under the name "Frankfort Bondholders Committee," and certain others under the name "London Bondholders Committee." These Bondholders Committees represented the owners of substantially all of the First Mortgage Bonds and Second Mortgage Bonds of the Oregon and California Railroad Company.

On March 28, 1887, a contract was made by and between the "Stockholders Re-constructed Committee" of the Oregon and California Railroad Company, called the "Stockholders Committee," the Pacific Improvement Company, the "London Bondholders Committee," the "Frankfort Bondholders Committee," these two Bondholders Committees representing British and German holders of the First Mortgage Bonds of the Oregon and California Railroad Company, the Southern Pacific Company, the Oregon and California Railroad Company and the Union Trust Company, a copy of which contract is

set out in Volume I, pages 166, 184, Transcript of Record. By this agreement the Stockholders Committee agreed to sell to the Pacific Improvement Company 117,290 shares of the preferred stock, out of a total 120,000 shares thereof, 67,785 shares of the common stock, out of a total of 70,000 shares, and Second Mortgage Bonds of the Oregon and California Railroad Company to the amount at their par value of \$2,610,000.00, being the total issue of the Second Mortgage Bonds, and agreed to deliver to the Pacific Improvement Company all of these on or before April 1, 1887. The Pacific Improvement Company, in consideration thereof and in payment therefor, agreed, upon delivery and deposit with the Union Trust Company, by the London and Frankfort Bondholders Committees, of bonds to the amount of at least \$8,400,000.00, par value, First Mortgage Bonds, secured under the trust deed of June 1, 1881, executed to Villard, White and Bretherton, as trustees, and for which the Farmers Loan & Trust Company was then sole trustee, to deliver to the Stockholders Committee one share of the capital stock of the Central Pacific Railroad Company, out of a total not exceeding 680,000 shares, against every two shares of Oregon and California Preferred Stock sold and delivered, as agreed, and one share of Central Pacific against every four shares of Oregon and California Common Stock to be sold and delivered, and would pay the sum of Four Shillings sterling for every share of Oregon and California Preferred Stock and Three Shillings

sterling for every share of Oregon and California Common Stock so sold and delivered.

In case the Stockholders Committee should, on or before April 1, 1887, acquire any additional amount of Preferred or Common Stock beyond the amount mentioned, then the Stockholders Committee agreed to sell and deliver the same to the Pacific Improvement Company on or before April 1, 1887, and the Pacific Improvement Company agreed to pay for the same in cash and stock at the same rate and in the same manner above specified. The Bondholders Committees agreed to sell to, and exchange with, the Southern Pacific Company, upon its purchase thereof by the Southern Pacific Company, the First Mortgage Bonds mentioned, secured, as stated, out of a total outstanding, at that time, of \$8,606,000.00 par value, to the amount at their par value of \$8,400,000.00, bearing all unpaid coupons belonging thereto, and for that purpose the Bondholders Committees agreed to deposit this \$8,400,000.00 par value of said bonds within forty days after March 28, 1887, with the Union Trust Company. The Southern Pacific Company upon its part agreed to deliver to the Union Trust Company, to be delivered by it to the Bondholders Committees, new bonds of the Oregon and California Railroad Company of the par value of \$9,240,000.00, being at the rate of 110% new bonds upon the amount of old bonds exchanged, and the new bonds to bear interest at the rate of 5% per annum from July 1,



1886, and to be guaranteed, both principal and interest, by the Southern Pacific Company, and to be secured by a first mortgage upon the railroad of the Oregon and California Railroad Company and its other property covered by the then unsatisfied mortgage dated June 1, 1881, securing the First Mortgage Bonds then outstanding. The Southern Pacific Company also agreed to pay the sum of Four Pounds sterling for each then existing bond of \$1000.00 received in exchange, as stated. Such new bonds were to be delivered by the Southern Pacific Company in payment and exchange for outstanding bonds, as stated, and were to be payable, principal and interest, in gold, forty years after date, and to bear interest at 5% per annum, payable half yearly, and to be guaranteed, as stated, and the mortgage was to be executed to the Union Trust Company. The amount of bonds to be issued under the new mortgage were to be at the rate of \$30,000.00 per mile for every mile of standard gauge road then or thereafter to be constructed or acquired, and covered by the mortgage, and \$10,000.00 per mile for every mile of narrow gauge road then or at any time thereafter constructed or to be constructed and acquired and covered by the mortgage. The mortgage deed called for by this agreement was afterwards executed on January 3, 1888, and bears date July 1, 1887, (Vol. I, pp. 197, 223, Transcript of Record.) The other details of the exchange of securities are specifically stated. The Southern Pacific Company also agreed to accept a lease of the

railroad of the Oregon and California Railroad Company for a period of at least forty years from the date of issue of the new bonds, and the Railroad Company agreed to execute the same. When the bonds and stock had been thus exchanged and all documents executed, as required by the agreement, the Pacific Improvement Company and the Southern Pacific Company agreed that the Second Mortgage Bonds of the Oregon and California Railroad Company, theretofore delivered by the Stockholders Committee to the Pacific Improvement Company, should be cancelled, and thereupon the First Mortgage Bonds deposited by the Bondholders Committees should also be cancelled, and the mortgages satisfied of record.

Pursuant to the provisions of the contract of March 28, 1887, and on or about May 12, 1887, all of the capital stock and all of the Second Mortgage Bonds of the Oregon and California Railroad Company were transferred, assigned and delivered to the Pacific Improvement Company, and all of the First Mortgage Bonds to the Southern Pacific Company. The Pacific Improvement Company held this capital stock until April 9, 1901, when it was assigned and transferred to the Southern Pacific Company, which has ever since remained and still is the owner and holder thereof. The Pacific Improvement Company owned and held the controlling interest in the Southern Pacific Company from about March, 1887, until after April 9, 1901.

In the trust mortgage of July 1, 1887, there is a certain provision which reads as follows: "And all the property, real, personal and mixed, which on the twelfth day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company." This referred to and was intended to refer to a deed of trust executed by the Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, of date June 1, 1881, a copy of which is set out in Volume I, pages 224, 259, Transcript of Record. The trust mortgage of July 1, 1887, was recorded on January 20, 1888, in the office of the County Recorder of Multnomah County, Oregon, and about the same time in the office of the County Recorder of each of the several counties in which was situated any of the lands granted by the Acts of Congress of July 25, 1866, or May 4, 1870. The Oregon and California Railroad Company executed and delivered certain of the bonds provided for by the trust mortgage of July 1, 1887, of which \$17,-745,000.00 in amount are still outstanding; the payment of all which bonds, both principal and interest, was and is guaranteed by the Southern Pacific Company. The bonds secured by the trust mortgage of July 1, 1887, were issued in large part pursuant to the contract of March 28, 1887, to retire the bonds secured by the earlier mortgages of June 1, 1881, and May 26, 1883, respectively, which had been sold abroad and a large part of the balance



of said bonds secured by the mortgage of July 1, 1887, also were negotiated abroad and most of such bonds "are now owned abroad—especially in Holland and Germany," (Vol. IV, p. 1575, Transcript of Record.) By the issuance and negotiation of two separate issues of its corporate bonds of date June 1, 1881, and May 26, 1883, respectively, above mentioned, the company provided funds aggregating approximately \$5,000,000.00, which were used in the construction of its railroad; and the bonds secured by the mortgage to the Union Trust Company of date July 1, 1887, were used to retire the bonds secured by the mortgages of 1881 and 1883, "and to complete the construction of the said railroad," (Vol. 4, p. 1575, Transcript of Record.) The total amount of bonds issued under the trust mortgage of July 1, 1887, was \$20,000,000.00, and from the proceeds of the sale of lands received by the Oregon and California Railroad Company, the Union Trust Company has paid off \$2,225,000.00 of said bonds, leaving a balance outstanding of \$17,745,000.00. The Union Trust, as trustee for the owners and holders of these bonds, claims to have a lien upon the granted lands under the trust mortgage of July 1, 1887. During the year 1887 the last section of the East Side railroad, extending from a point near Ashland to the southern boundary line of Oregon, and the section of railroad in California extending from Delta to connection with the said East Side railroad at the said southern boundary line of Oregon, were constructed by the

Pacific Improvement Company. On or about June 6, 1887, a contract was made and executed by and between the Oregon and California Railroad Company and Pacific Improvement Company, a copy of which is set out in Volume IV, pages 1697, 1702, Transcript of Record. At that time a large part of the work of construction had been performed by the Pacific Improvement Company, but it is not intended to stipulate, and it is not agreed, whether said prior work of construction was performed pursuant to the contract of October 11, 1886, *supra*, (Vol. II, pp. 949, 956, Transcript of Record,) or some other contract, or otherwise. On or about June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, and all of the First and Second Mortgage Bonds (not including the bonds issued under the trust mortgage of July 1, 1887) together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged, and thereupon, and ever since, the Southern Pacific Company has continued in possession, pursuant to the leases mentioned (Vol. II, pp. 85, 196, Transcript of Record) of the railroads and appurtenances therein described. These leases do not affect or appertain to any part of the granted lands except such as may have been granted as right of way or station grounds under the Acts of Congress of July 25, 1866, and May 4, 1870. On February 7, 1891, the Board of Directors of the Oregon and California Railroad Company adopted a resolution prescribing the form of deeds to be

executed by the Oregon and California Railroad Company, one a deed of grant, bargain and sale, the other a deed of conveyance, release and quitclaim, (Vol. IV, pp. 1702, 1710, Transcript of Record.) On March 14, 1892, the Board of Directors of Oregon and California Railroad Company adopted a resolution prescribing another form of deed specifically called a quitclaim deed, (Vol IV, pp. 1710, 1713, Transcript of Record.) These forms of deeds are the forms of deeds referred to in subdivision 8, third paragraph of the Bill of Complaint, (Vol I, p. 52, Transcript of Record) and which the Bill charges were adopted "anticipating and seeking to avoid responsibility for the contemplated violations of the terms and conditions of said grants."

At this point it is proper to call the attention of the court to the testimony of William Singer, Jr., who prepared these forms of deeds and these resolutions, and who testified (Vol. V, pp. 2507, 2510, Transcript of Record) that he had been Land Attorney since 1884 or 1885 for the Central Pacific Railroad Company's land grant, and for the entire land grant of the California and Oregon Railroad Company, both in Land Office proceedings and in courts, other than federal courts, and that in 1894 there was added to his jurisdiction the federal cases for the California and Oregon, Oregon and California, Central Pacific and Southern Pacific Company's land grants. Referring to the form of deed described, Judge Singer testified that upon in-



vestigation of the operation of the Land Department of the Oregon and California, he found that warranty deeds were being given for patented and unpatented lands. He recommended to Mr. Mills, in 1889 to 1890, that the issuance of warranty deeds be discontinued and that a deed granting and conveying the lands be given to patented lands and that a deed quitclaiming all the right, title and interest which the company had or might thereafter acquire, be given to unpatented lands for the Oregon and California land grants, and his recollection is that he drafted these deeds. "The primary object of these forms of deeds was to standardize the forms of deeds, although an important consideration with him was to dispense with warranty deeds, which, in his experience as a railroad attorney, were not given by any railroad other than the Oregon and California. There was no purpose by these instruments, or the adoption of these forms, to anticipate or meet any contention or claim now made by the United States in this suit as to the provisions of Section 4 of the Act of May 4, 1870, or the Act of April 10, 1869. His recollection is that prior to that time he had given a written opinion that the proviso in the Act of May 4, 1870, was a covenant and not a condition, and that the Act of April 10, 1869, imposed no covenant if it had any effect at all."

2,422,708 acres of lands in the East Side grant were patented to the company between the years

1893 and 1906, both inclusive, and 128,618.13 acres belonging to the West Side grant were patented to the company between the years 1895 and 1903, both years inclusive. These patents were issued from time to time between said dates mentioned pursuant to applications made therefor by the company from time to time between the years 1876 and 1906. No patent has issued to the company under either of these grants since the year 1906, except Supplemental Patent No. 3, of date June 21, 1909, for 161.75 acres of land in the indemnity limits of the East Side grant. A rapidly increasing demand for the lands of the company in large quantities and at increased prices, commenced about 1889 or 1890, and has continued ever since. From about 1894 to 1903 the company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre; and in several instances between these dates, the company sold lands of the grants in quantities from 1000 acres to 20,000 acres to one purchaser, at prices ranging from \$5.00 to \$20.00 per acre. In one instance at \$35.00 per acre; in another instance at \$40.00 per acre; and in one instance 45,000 acres at \$7.00 per acre, to a single purchaser. The company has heretofore made approximately 5306 sales of its land grant lands, aggregating 820,000 acres, approximately 4930 of which said sales were for quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres, and approximately 376

of which said sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the lands for purposes other than settlement, and at prices in excess of \$2.50 per acre. Approximately 478,000 acres of these 524,000 acres were sold since the year 1897, and approximately 370,000 acres of these 524,000 acres were sold to 38 purchasers in quantities exceeding 2000 acres to each purchaser; approximately three-fourths, in number, of all sales made since the year 1897 were made by contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment; many of which sales were still pending under such contracts on January 1, 1903, conveyances under which were executed from time to time thereafter, and a considerable number of these contracts were still pending when this suit was brought, September 4, 1908. Of the total sales made, 4508 had been fully executed and conveyances given, aggregating 740,002.45 acres, at the time the Joint and Several Answer was filed, September 5, 1911. At that time 571 executory contracts were still pending, aggregating 81,684.31 acres. Exhibit No. 4 to the Joint and Several Answer, (Vol II, pp. 971, 986, Transcript of Record) is substantially a correct statement of all land sales made by the company, including all sales executed by conveyances and all sales under contracts not executed



by conveyances, up to September 5, 1911. From this Exhibit No. 4 the court will note five classifications giving acreage sold from 1871 down to 1910, both inclusive, as follows:

(1) Sales not exceeding one-quarter section or 160 acres to one person, at a price not exceeding \$2.50 per acre.

(2) Sales in excess of one-quarter section or 160 acres to one person, but at a price not exceeding \$2.50 per acre.

(3) Sales not exceeding one-quarter section or 160 acres to one person but at a price exceeding \$2.50 per acre.

(4) Sales in excess of one-quarter section or 160 acres to one person, at a price exceeding \$2.50 per acre.

(5) Acres sold, as to which, owing to destruction of Land Department records, no information is at hand to show the price for each sale.

The sales under classifications Nos. 2, 3, and 4, would be in breach of the alleged conditions subsequent relied upon by the United States in this suit, and sales under classification No. 1, would be the only legal sales that the company has made, except such as may have been legal under classification No. 5, which may be presumed to have been legal in the absence of affirmative proof to the contrary.

It also appears from this Exhibit No. 4, (Vol. II, p. 972, Transcript of Record) that 85 sales were

made by the European and Oregon Land Company from 1871 to 1874, both inclusive, but contracts were fulfilled subsequent to 1874 by the Oregon and California Railroad Company, and that these sales covered 6581.15 acres, of which 78 sales were for a consideration of \$20,859.99; that 33 of these sales averaged \$2.25 per acre, and 57.16 acres to each purchaser; that one sale in excess of 160 acres to one person was made; that 39 sales averaged \$4.16 per acre, and five sales were made in excess of 160 acres to one person and in excess of \$2.50 per acre, to-wit, \$3.65 per acre average price and 2146.41 acres average acreage, each of said five sales, all belonging to the East Side grant, according to the classification of these sales stipulated to be and which are substantially correct.

The total sales made in the West Side grant were 335, of which 105 would be legal as the Government construes Section 4 of the Act of May 4, 1870; 220 of these sales would be illegal as thus construed, and as to 10 sales, it cannot be known whether they were legal or illegal. As thus interpreted, the total illegal sales from the years 1871 to 1910, both inclusive, of the lands in the East Side grant, are 376, covering 524,200.42 acres for \$3,735,735.08, and these so-called "illegal sales" were uniform and continuous during that period.

Exhibit "J", (Vol. I, pp. 260, 270, Transcript of Record) is substantially a correct statement of all conveyances of granted lands made by the company,

and of all contracts pending at the time it was compiled on July 1, 1908. Exhibit "J" is a schedule of all sales of granted lands, including conveyances and pending contracts, separately stated as to each land grant, and the general source from which the information therein has been obtained, is from conveyances executed prior to June 11, 1879, as recorded in the office of the Recorder or Clerk of each of the counties in which any of the granted lands is situated, and from conveyances executed on and after June 11, 1879, as shown by the records of the minutes of the proceedings of the Board of Directors of the company, and as to pending contracts, the annual return of the companies to the Assessors of the several counties in which any part of the lands granted is situated. The sales are classified according to the quantity of land sold, the purchase price per acre, and are designated as

(a) Sales in quantity not exceeding one-quarter section and for a price not exceeding \$2.50 per acre.

(b) Sales in quantity not exceeding one-quarter section but for a price exceeding \$2.50 per acre.

(c) Sales in quantity exceeding one-quarter section but not exceeding 640 acres.

(d) Sales in quantity exceeding 640 acres but not exceeding 2000 acres.

(e) Sales in quantity exceeding 2000 acres, and these sales are classified under each land grant.



The information contained in this exhibit may be recapitulated as follows:

### RECAPITULATION

Years	Total Sales	Total Acres	Total Purchase Price
Sales in quantities not exceeding 160 acres:			
1872-1897	2501	155,618.55	\$ 420,950.10
1898-1908	2429	140,108.97	813,588.41
	<hr/> 4930	<hr/> 295,727.52	<hr/> \$1,234,538.51
Sales in quantities exceeding 160 acres, but not exceeding 640 acres:			
1872-1897	117	33,530.43	\$ 77,292.35
1898-1908	163	57,904.24	325,432.94
	<hr/> 280	<hr/> 91,434.67	<hr/> \$ 402,725.29
Sales in quantities exceeding 640 acres, but not exceeding 2,000 acres:			
1872-1897	11	10,756.91	\$ 36,985.21
1898-1908	45	45,609.38	373,773.91
	<hr/> 56	<hr/> 60,366.29	<hr/> \$ 410,759.12
Sales in quantities exceeding 2,000 acres:			
1872-1897	1	2,234.70	\$ 4,579.40
1898-1908	39	370,164.76	2,917,671.27
	<hr/> 40	<hr/> 372,399.46	<hr/> \$2,922,250.67
Total sales in quantities exceeding 160 acres:			
1872-1897	129	46,522.04	\$ 118,856.96
1898-1908	247	477,678.38	3,616,878.12
	<hr/> 376	<hr/> 524,200.42	<hr/> \$3,735,735.08

	Total Sales	Total Acres	Total Purchase Price
Total sales:			
In quantities not exceeding 160 acres	4930	295,727.52	\$1,234,538.51
In quantities exceeding 160 acres	376	524,200.42	3,735,735.08
Total	5306	819,927.94	\$4,970,273.59

The apparent discrepancies between said "Exhibit No. 4" (Vol. II, pp. 971, 986, Transcript of Record) and "Exhibit J" (Vol. I, pp. 260, 272, Transcript of Record) are explained by the fact that "Exhibit No. 4" is compiled with reference to the original date of sales, while "Exhibit J" is compiled with reference to the date of the executed conveyances, except as to pending contracts. Moreover, the classification of sales, (as to purchase price and quantities sold to each purchaser) in "Exhibit No. 4" differs from the classification used in "Exhibit J." At or about the time the Joint and Several Answer was filed on September 5, 1911, there remained unsold of these granted lands, 2,306,492.81 acres, of which 2,075,616.45 acres were theretofore patented, and 284,876.36 acres unpatented, all of which unsold lands are claimed by the company under its land grants. Approximately 180,000 acres of these unsold lands are situated

southerly from Eugene and constitute more than one-third, in alternate sections, of all lands lying within approximately twenty miles on each side of the East Side railroad from Eugene to the southern boundary line of Oregon, and only a small portion of these lands in that part of the East Side grant has ever been sold. Since January 1, 1903, and principally since February 14, 1907, (the date when the Legislature of Oregon adopted its memorial to the President and requested Congress to enact such laws and take such steps as might be necessary to compel the railroad company to comply with the grant and to enact and declare some sufficient penalty for noncompliance therewith, by way of forfeiture, as Congress may deem best, Vol. I, pp. 520, 521, Transcript of Record), persons exceeding four thousand in number have severally applied to the company to purchase certain of these unsold lands in quantities not exceeding 160 acres to each person, claiming that they desired such lands to settle and establish a home upon, and in a few instances claiming that they had settled and established a home upon the lands applied for by them, and at and about the time these applications were made, each applicant stated that he then was willing and able to tender payment at the rate of \$2.50 per acre for the lands applied for by him, and in a few instances such tender was made. (The record shows that 67 of these applicants are parties to this suit as cross-complainants, claiming to be actual settlers, and there are interveners who are par-



ties to this appeal, who claim to have been applicants to purchase these lands for the purposes and upon the terms stated, and to be what are called by this record, possible or potential settlers.)

B. A. McAllaster testified as a witness, (Vol. IV, pp. 1958, 1960, Transcript of Record) that

“About 10,000 applications to purchase quarter sections of timber lands belonging to the company at \$2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. These applications are made usually in this way. Some person comes in to the office with a bunch of applications, any where from 5 to 10 up to 50 or 100 and presents one application and tenders the sum of \$400.00 with it and that being rejected, this person follows by presenting another application and tendering the same \$400.00 and that being rejected, the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be and in nearly all cases the blanks used by these so-called applicants are printed forms. He has prepared a memorandum showing the number of applications of that class up to a certain time and whether or not several persons have made application for the same quarter section. This memorandum was prepared about March 1, 1909, and shows the applications that were in his hands at that time. There were 7991 applications in his hands on

March 1, 1909, covering 6168 quarter sections, or in some cases less—occasionally an 80 acres. The entire number of applications up to July 30, 1912, would, he thinks, approximate 10,000. When this table was made up March 1, 1909, there were 4749 tracts of land each covered by one application; there were 1097 tracts each covered by two applications; 256 tracts each covered by three applications; 54 tracts each covered by four applications; 8 tracts each covered by 5 applications, and 4 tracts each covered by six applications.”

On or about January 1, 1903, the company withdrew from sale all of these unsold lands, and at all times refused and still refuses to approve or accept any of the applications to purchase, just mentioned, claiming that all the lands so applied for “are essentially timber lands unsuitable for any other purpose,” (Vol. IV, p. 1582, Transcript of Record). The company now assumes and asserts an absolute and unconditional estate in all these unsold lands.

Exhibit “K” to the Bill of Complaint, (Vol. I, pp. 273, 519, Transcript of Record) as corrected by Exhibit No. 5 to the Joint and Several Answer, (Vol. II, pp. 987, 1002, Transcript of Record) contains a true list and description of all the unsold lands which have heretofore been patented.

Exhibit No. 6 to the Joint and Several Answer, (Vol. 2, pp. 1002, 1039, Transcript of Record) contains a true and correct list and description of all

unsold, unpatented, primary lands, and of all unsold selected but unpatented indemnity lands claimed by the company under its land grants.

The reasonable value of these unsold lands exceeds the sum of \$30,000,000.00. (It is believed, but not stipulated, that the description found in the decree of the court below, entered July 1, 1913, Vol. III, pp. 1296-1550, Transcript of Record, contains an accurate description of all of the lands of the company of every class attempted to be forfeited by the decree, as well as a schedule describing the right of way lands excepted from the operation of the decree.)

The company, in addition to the purchase price received from sales of granted lands, has received and enjoyed, between April 1, 1870, and April 30, 1911, other benefits on account of said granted lands, as follows:

(a) \$88,205.06 forfeited by purchasers upon defaulted contracts;

(b) \$5532.07 rentals for certain portions of granted lands leased;

(c) \$18,850.25 stumpage value of timber cut and used by the company from these lands;

(d) \$10,687.92 collected from persons who, without permission, have cut timber growing on these lands.



The company has not cut, nor permitted others to cut, timber growing on these lands since the commencement of this suit, and all of these unsold lands now are and at all times since this suit was brought, September 4, 1908, withdrawn from sale by the company. Until about the year 1890 or 1891, there was substantially no demand for said granted lands except for the purpose of settlement, or by persons of limited means applying to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding \$2.50 per acre; and it is stipulated that "nearly all sales made prior to the year 1894 were of that character and to such persons," but this stipulation is corrected and made more definite by the facts stipulated as to the correctness of Exhibit No. 4, (Vol. II, pp. 971, 986, Transcript of Record) and Exhibit "J", (Vol. I, pp. 260, 270, Transcript of Record, supra,) and by the facts stipulated in subdivision 21, (Vol IV, pp. 1590, 1623, Transcript of Record) showing by years for the half ending December 31, 1879, to the year ending June 30, 1903, both inclusive, the average price per acre for all sales to date of each report, average price per acre for all sales during the half year or year, average price for all purchases to date, maximum price per acre from sales, minimum price per acre from sales, maximum and minimum price then asked, and the average price then asked, and which shows, as set out in Exhibit "A" to the Joint and Several Answer, of defendants, (Vol. II, pp. 922, 923, Transcript of Record) approximate price

received per acre during second half of 1879 was \$15.00; during 1880 was \$5.00; during first half of 1881, \$10.00; during second half of 1881, \$5.00; first half of 1882, \$3.50; second half of 1882, and for the years 1883, 1884, 1885, down to and including the year 1890, \$15.00; for the years 1892, 1903, both inclusive, with the exception of the year 1897, the maximum price received per acre was \$30.00, and that at no time after the commencement of the year 1883, was the average price received per acre under \$2.50 per acre, but the average price ranged from \$2.56 per acre for the first half of 1885 up to \$7.85 per acre during the year 1902.

These facts are shown in the annual reports of the company required to be made to the United States under the Acts of Congress of June 19, 1878, (20 Stat. 169), March 3, 1881, (21 Stat. 385, 413,) April 17, 1900, (31 Stat. 86, 134), March 3, 1901, (31 Stat. 960, 1009), June 28, 1902, (32 Stat. 419, 481), March 3, 1903, (32 Stat. 1083, 1147). The Act of June 19, 1878, (20 Stat. 169) is found in Vol. IV, pp. 1721-1724, Transcript of Record) and repeals Section 20 of an Act entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, (12 Stat. 489) and repeals an Act entitled, "An Act relative to filing reports of rail-

road companies," approved June 25, 1868, (15 Stat. 80).

During a large part of the time prior to the year 1894, the company maintained an immigrant bureau, engaged in inducing immigration and settlement upon its granted lands, and the greater part of the sales of lands to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding \$2.50 per acre, were made after the year 1894.

Exhibit No. 17 to the stipulation, (Vol. IV, pp. 1730-1731 Transcript of Record) is a correct statement of the facts therein stated, and is appended to the Stipulation as to the Facts for the purpose of correcting "Exhibit No. 9" to the Joint and Several Answer, (Vol. II, pp. 1143, 1148, Transcript of Record.) As thus corrected, this stipulation is admitted to be true, and shows deeds made by the company, expressly approved by the Interior Department, conveying more than 160 acres of land grant forest reserve lands to a single purchaser, at prices exceeding \$2.50 per acre, which deeds were submitted by the direct or mesne grant thereunder as lieu bases for lieu selection of other lands under the Act of Congress approved June 4, 1897, (30 Stat. 11, 30) which deeds, on their face, show the true acreage and purchase price paid, and aggregate 42,068.82 acres, sold to fourteen different purchasers between June 24, 1899, and March 2, 1900.



A number of these forest lieu selections were pending in the Interior Department at the time the investigation of the subject matter of this suit was instituted in the year 1907, and upon the recommendation of the Attorney-General, all of these selections, thus pending, were suspended, and are still under suspension. The acreage thus under suspension aggregates 22212.77 acres.

Exhibit No. 10 to the Joint and Several Answer, (Vol. II, pp. 1149, 1151, Transcript of Record), is correct, omitting the words "A few." It is stipulated that this exhibit shows "institution of suits brought by the United States against the Oregon and California Railroad Company, in the United States Circuit Court for the District of Oregon, to quiet title to or cancel patent for lands of the said company's East Side land grant, in which the pleadings or proofs showed sales in quantities exceeding 160 acres to single purchasers, or at prices exceeding \$2.50 per acre, without objection made by the United States to any such sale because of land quantity sold to one purchaser or sale price."

The first of these suits thus instanced was begun February 3, 1892, and the last February 27, 1901. (The first suit involved 240 acres of lands sold to John A. Hurlburt for \$720.00, and the issues were finally determined by the Supreme Court of the United States in *United States v. Oregon and California Railroad Company, et al.*, in 176 U. S. 28.)

Exhibit "L" to the Bill of Complaint, (Vol. I, pp. 520, 521, Transcript of Record) is a correct copy of the memorial of the Legislature of Oregon to the President and Congress, adopted February 14, 1907, and communicated to Congress immediately thereafter. A substantial copy of the Joint Resolution of Congress of April 30, 1908, (35 Stat. 571) in so far as it relates to these land grants, is set out in the Bill of Complaint, (Vol. I, pp. 67, 68, Transcript of Record) and this suit was instituted pursuant thereto.

Since the beginning of this suit, forty-five other and separate suits have been brought in the name of the United States, each against the defendants herein, and another person or other persons, praying for the enforcement of the claimed rights and equitable remedies pertaining to certain granted lands therein described, sold and conveyed by the company to such other persons in alleged violation of alleged provisions or conditions of these land grants.

Defendants' Exhibit 294, Vol. XIII, pp. 6932, 6999, Transcript of Record,) is a statement concerning lands involved in these suits, giving the suit number, the purchaser under the contract and grantee in deed, made defendant, the date of the contract, acreage, price per acre, consideration and number and date of deed, and all this information is given as to each suit, of which there are forty-

five in number, known in this record as "Innocent Purchaser Suits."

The facts stated in defendants' Exhibit 294 were verified by the witness B. A. McAllaster, Land Commissioner, (Vol. IV, p. 1993-4 Transcript of Record.)

Defendants' Exhibit 295 is a large map prepared to show, in colors, the location of the lands involved in the so-called "Innocent Purchaser Suits," giving the number of each suit, and acreage involved, (Vol. XIII, p. 7000, Transcript of Record) and the facts stated therein are verified by the witness B. A. McAllaster, Land Commissioner, (Vol. IV, pp. 1993-4 Transcript of Record.) It appears therefrom that the total acreage involved in these suits is 381,395.77 acres, and total purchase price paid the company was \$2,851,092.33. It was stipulated between the United States and the defendants-appellants, (Vol. V, pp. 2528, 2529, Transcript of Record) "that the court, in any stage of this case, until and including a final hearing in the Supreme Court of the United States, if the case shall reach that court, shall take judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the 'Stipulation as to the Facts,' including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection, on the part of complainant that the evidence is immaterial and irrelevant."



Under this stipulation, the court may now take judicial notice of the fact that up to the 27th day of April 1914, decrees of forfeiture had been entered as against the purchaser, grantee defendant, in twenty-eight suits of these forty-five suits, and an order of dismissal entered against the defendants-appellants herein in each of these suits, the defendants, now appellants herein, neither objecting to nor consenting to such orders of dismissal, as shown thereby.

Under these decrees thus entered, the different purchasers have paid to the United States, under Act of August 20, 1912, (37 Stat. 320) under which these forty-five suits are in process of adjustment, and which it is safe to say was enacted for that purpose, \$852,219.95, at the rate of \$2.50 per acre, and patents have been issued, or will issued, therefor. There remain on the 27th day of April, 1914, seventeen suits awaiting like decrees, excepting that in suit No. 3464 involving 6463.72 acres, the Southern Pacific Company was the grantee purchaser of the lands involved therein, and in view of that fact, these suits stand upon demurrer to the Bill of Complaint, awaiting final determination of this appeal, although there is no express stipulation to that effect. (The Southern Pacific Company paid therefor \$248,126.86 (Vol. XIII, p. 6699 Transcript)

Defendants' Exhibit 295 will show the location of these lands involved in these so-called "Innocent

Purchaser Suits," and that the lands are all timber lands chiefly and in the main only valuable for the timber thereon, and are not claimed, so far as is known, by any of the so-called "actual settlers" who are cross-complainants-appellants herein, or applied for by any of the interveners-appellants herein. If it should turn out that any of these lands have been thus applied for by these so-called potential or possible settlers, or have been "actually settled" upon by any of the so-called "actual settlers" or cross-complainants herein, the patents issued under the Act of August 20, 1912, would no doubt deprive these parties of their alleged right to purchase any of these lands as such actual or potential settlers under the proviso of April 10, 1869, or Section 4 of the Act of May 4, 1870, and to that extent the Act of August 20, 1912, would be repealed by the actual settler clause of these two acts, and a waiver of the breach, if any, caused by the sales made by the company to these forty-five purchasers, as to those lands, if not as to the entire unsold lands.

For convenient reference, the facts stated in defendants' Exhibits 294 and 295, relating to these Innocent Purchaser Suits, showing the number of each suit, acreage involved, and purchase price paid to the company for the lands involved in each suit, are shown by the following table:

Suit No.		Acres	Suit No.		Acres
3416	\$ 4160.00	1040.00	3439	\$ 29263.40	4893.64
3417	16631.56	4118.14	3440	85949.17	13222.95
3418	107356.00	9759.64	3441	4998.55	1999.42
3419	9353.35	3733.36	3442	293281.10	34921.85
3420	6091.83	2020.73	3443	16725.12	5973.26
3421	4706.55	1880.62	3444	9229.19	1476.67
3422	3760.00	1160.00	3445	95477.69	15861.74
3423	116269.93	14533.74	3446	6560.00	1440.00
3424	502753.40	67559.72	3447	188123.43	29567.34
3425	6610.82	2674.02	3448	4070.36	1252.42
3426	21011.40	3115.79	3449	321807.00	45972.43
3427	43653.10	7042.36	3452	180888.56	15730.44
3428	26668.84	4848.88	3453	36123.00	4816.40
3429	4328.76	1442.92	3454	19258.30	1925.83
3439	16960.00	2560.00	3455	4594.22	1364.64
3431	96966.48	20491.62	3456	7109.36	2523.76
3432	21140.00	3160.00	3457	21632.40	1720.39
3433	16567.58	3479.96	3458	5900.00	2360.00
3434	3827.00	1042.00	3459	4866.85	1219.65
3435	110497.00	14216.91	3460	6143.55	1481.09
3436	13277.77	2463.79	3463	70073.80	5497.17
3437	38304.06	7366.86	3464	248126.86	6463.72

In this connection, the attention of the court is drawn to Senate Report No. 402, Sixty-third Congress, Second Session, of date April 4, 1914, made by Mr. Chamberlain, from the Committee on Public Lands, in which, and as a part of such report, a letter from First Assistant Secretary of the Interior, A. A. Jones, of date January 17, 1914, appears. From the letter of the Assistant Secretary



we quote: "For information it may here be stated that twenty-seven of these suits, involving in the aggregate 339,412 acres of land, have been compromised by stipulation, under said Act of August 20, 1912, *supra*, the decrees of forfeiture entered, moneys paid, and the lands patented to the purchasers." At this date, April 24, 1914, decrees of forfeiture have been entered, under the act of August 20, 1912, in twenty-eight of these cases, and testimony taken on behalf of the defendant purchasers therein, to be submitted to the Attorney-General in order that he may, under the Act, recommend the issuance of patents therefor, upon payment of \$2.50 per acre. We are advised that upon April 27, 1914, the Department of Justice has recommended that 1475.07 acres involved in one of these suits be patented under the act, and 339,412 acres have heretofore been patented. There has been paid to the United States for these lands \$852,219.95.

The parties were unable to stipulate as to the value of the property described in the mortgage deed of July 1, 1887, not including any of the granted lands, and proof of the value of the railroad lines and their appurtenances, was left open.

RICHARD KOEHLER, called as a witness on behalf of complainant, testified, (Vol. IV, pp. 1902-1908 Transcript of Record) that "in his judgment the railroad of the Oregon and California Railroad

Company, including all equipment and rolling stock, and the other property mentioned in the mortgage of July 1, 1887, with the exception of the land grant lands, was of the value, at that time, of about \$50,000 per mile;" that at the time the company owned 451 miles of railroad in Oregon. Upon cross examination he testified that "he estimated the value of the road, at the time of the Union Trust Company mortgage, at \$50,000 a mile, and based that figure upon his remembrance of the value of the railroad property generally, the cost of construction of railroads, and its profits and earning power. \* \* \* \* He figured that if the connection was made with the California and Oregon line, in California, there would be a future, probably, for the road; if connection had been absolutely impossible, for whatever reason it may have been, the value would have been less, how much less he is not prepared to say; cost of construction from Ashland, south, was very great, it was an expensive piece of road to build, that is, to connection with the California and Oregon line, over the Siskiyou Mountains; the road was only once in the hands of a Receiver, but it was near bankruptcy often; it was not bankrupt in 1884, it never came to actual bankruptcy until January, 1885." This estimate would place the value of all the property covered by the mortgage of July 1, 1887, other than the land grant lands, at \$22,550,000, or \$255,000 in excess of the principal of the bonds to be secured thereby. This

value, as shown by his testimony, was more or less speculative, in that it rested upon "future probability for the road."

Pursuant to the rules and regulations of the Department of the Interior, all patents issued to these lands were issued based upon application in writing therefor, filed from time to time, in the appropriate United States Land Office, by the company as the "successor and assignee" of the East Side Company and West Side Company, respectively. These applications contained description lists, and each application was supported by an affidavit signed and sworn to by the Land Agent of the company, thereto duly authorized, alleging, among other things, that "the said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting Act" under which patents were applied for and issued, as stated.

The contracts and deeds executed by the company prior to about the year 1894, contain (substantially) these words:

"Reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use



all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands."

The words "and also reserving all claim of the United States to same as mineral lands" were stricken from the reservation clause in the contracts and deeds executed by the company from about 1894 until about 1902, and in contracts and deeds executed by the company during and at all times after about the year 1902, the words, "and also reserving and excepting from said described premises so much thereof as may be mineral lands", were substituted therefor.

The company claims to be the owner of all rights, lands and interest in lands, at any time excepted or reserved thereby.

The defendants-appellants claim that the Oregon and California Railroad Company is and claims to be the owner of the lands granted, which have not heretofore been sold and transferred, together with all right of way and other rights and property in Oregon, described as granted by Section 3 in the Act of July 25, 1866, and Section 1 of the Act of May 4, 1870, and all the rights and property reserved, as stated, for any and all railroad purposes, and the improvements upon the said lands and property, and that the same is subject to the mortgage of July 1, 1887.

A correct statement of all maps of survey and location filed in the office of the Secretary of the Interior by the East Side Company, and the Oregon and California Railroad Company, and the dates thereof, under and pursuant to the provisos of the East Side Grant; also a correct statement of the map filed in the same office by the West Side Company, under and in pursuance of the West Side Grant, with the dates thereof, is set out in Vol. IV, at pages 1713-1716 Transcript of Record. The map of the first section of the East Side line, from East Portland to Jefferson, was filed October 29, 1869. A map of the twelfth section, extending from Sec. 30, T. 40 S., R. 2 E. to the southern boundary of the State of Oregon, was filed August 18, 1884. A map of the first section of the West Side line, extending sixty miles from Portland, by way of Forest Grove and McMinnville, towards Corvallis, was received by the Interior Department July 1, 1868, returned July 6, 1868, for verification, and received by the Department of the Interior September 16, 1868, but no action taken thereon. A second map of the first sixty miles was returned to the Interior Department, received September 22, 1868, and a third map September 24, 1868, which was sent to the Commissioner of the General Land Office November 22, 1871. A map of the section extending from Portland to McMinnville, and from Forest Grove to Caster Creek, was filed May 17, 1871, and the map of the remainder of the line, from Caster Creek to Astoria, was filed February 2, 1872.

A correct statement of the dates of construction, completion, approval, and acceptance, of the several sections of the East and West Side railroads, separately stated, is set out in Vol. IV, pp. 1717-1720 Transcript of Record, and shows that the first section of twenty miles of the East Side railroad was completed December 24, 1869, favorably reported upon by Commissioners December 31, 1869, submitted by the Secretary of the Interior to the President January 26, 1870, and its acceptance recommended, and such recommendation approved by the President January 29, 1870. The second, third and fourth sections of twenty miles each, extending to a point about one-half mile beyond the station of the City of Albany, were completed during the year 1870, reports of Commissioners transmitted by the Secretary of the Interior to the President February 28, 1871, with recommendations that the road be accepted, and such recommendations approved by the President February 28, 1871. The fifth and sixth sections of twenty miles each were completed, and Commissioners' reports thereon submitted by the Secretary of the Interior to the President March 7, 1872, with recommendations that the line be accepted, which recommendations were approved by the President March 11, 1872. The seventh, eighth and ninth sections, beginning at a point two and one-half miles northwest of Eugene City, and ending near Roseburg, were completed in 1872, report of the Commissioners was submitted by the Secretary of the Interior to the President July 10, 1878,



with recommendations that the line be accepted, and such recommendations were approved by the President July 11, 1878. The tenth section of 45 miles was completed and wholly in operation from May, 1883, and 28 miles thereof, from Roseburg to Riddle, had been in operation since about November, 1882. The report of the Commissioners was submitted by the Secretary of the Interior to the President August 20, 1883, with recommendations that the line be accepted, and such recommendations were approved by the President August 29, 1883. The eleventh section of 100 miles in length, extending from a point 45 miles south of Roseburg, to a point about  $11\frac{1}{4}$  miles south of Ashland, was open for public use from the north end to Glendale, 20 miles, May 14, 1883; to Grants Pass, 55 miles, December 4, 1883; to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884. The report of the Commissioners was submitted by the Secretary of the Interior to the President January 13, 1887, with recommendations that the section be accepted, and such recommendations were approved by the President January 29, 1887. The twelfth section, extending from the point  $11\frac{1}{2}$  miles south of Ashland, to the boundary line between Oregon and California, a distance of 24.135 miles, was completed prior to June 20, 1888, the report of the Commissioners thereon was transmitted by the Secretary of the Interior to the President October 23, 1889, with recommendations that the railroad be

accepted, and such recommendations were approved by the President November 8, 1889.

The acceptance of the construction of the road, the reports of the Commissioners, the recommendations by the Secretary of the Interior to the President that the railroad be accepted, and the approval by the President thereof, should be considered in connection with the way and manner in which the grant of July 25, 1866, had been administered, from the beginning, and the knowledge thereof brought to the attention of the Secretary of the Interior, and to the Department of Justice, by the correspondence between the European & Oregon Land Company, Attorney General Geo. H. Williams, Willis Drummond, Commissioner of the General Land Office, and C. Delano, Secretary of the Interior, (Defendants' Exhibits 373 to 378 both inclusive, Vol. XIV, pp. 7371-7502 Transcript of Record; Governments' Exhibit 109, Vol. X, pp. 5322-5373 Transcript of Record) also in connection with subdivision XXI, "Stipulation as to the Facts," (Vol. IV, pp. 1584-1623 Transcript of Record) and Exhibit No. 15 to Stipulation, (Vol. IV, pp. 1721-1724 Transcript of Record) and other facts imputing notice to the United States as to the way and manner in which these land grants have been administered, and the lands sold, from the beginning, without regard to the "actual settler" clause in the proviso of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

EXHIBIT No. 11, (Vol. II, pp. 1152-1155 Transcript of Record) correctly shows the quantity of land patented to the company, compiled by years, separately stated as to each grant, giving the dates of all Acts of Congress recited or referred to in such patents, and shows that patents issued continuously from 1871 to 1909, as to the East Side Grant, and from 1895 to 1903, both inclusive, as to the West Side Grant, and that a total acreage of 2,894,566.98 acres has been patented under these grants. The West Side Grant patents were issued to the Oregon and California Railroad Company, "as successor to the Oregon Central Railroad Company," but no patent issued for lands of the East Side Grant contains a recitation that it was issued to the Oregon and California Railroad Company "as successor to" any company.

The schedule of suits brought by various parties known as cross-complainants in this record, is set out as Exhibit P, to the bill of complaint, (Vol. I, pp. 528-537 Transcript of Record) showing 66 suits in all, of which 38 affect lands of the East Side Grant, (Act of July 25, 1866) and 28 affect lands of the West Side Grant, (Act of May 4, 1870). During the month of December, 1908, all of these suits other than the one brought by Roy W. Minkler, were consolidated with the main suit, and thereafter all of the plaintiffs in said suits, other than Roy W. Minkler, on or about January 15, 1909, filed their cross-complaints, and on April 24, 1911,



the demurrers of the defendants to said cross-complaints were sustained by the court. On June 9, 1910, the suit brought by Roy W. Minkler was dismissed, by mutual consent of all parties thereto.

On June 19, 1878, Congress passed an act (20 Stat. 169) entitled, "An Act to create an Auditor of Railroad Accounts and other purposes," a copy of which act is set out in Vol. IV, pages 1721-1724. Subsequent acts of Congress relating to the same, under which the Oregon and California Railroad Company, from 1879 to 1903, made its reports contemplated thereby, as set out in subdivision XXI of "Stipulation as to the Facts," (Vol. IV, pp. 1590-1623) which reports show the average price per acre for all sales to date of each report, maximum price per acre from sales, received, and maximum price per acre, asked, and showing continuous disregard of the "actual settler" clause in the proviso of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870,— are as follows:

Act of Congress of March 3, 1881, 21 Stat. 385-413, (on pages 409-410)

Act of Congress of April 17, 1900, 31 Stat. 86-134, (on pages 124-125)

Act of Congress of March 3, 1901, 31 Stat. 906-1009, (on page 1000)

Act of Congress of June 28, 1902, 32 Stat. Part 1, pp. 419-481, (on pages 455-456)

Act of Congress of March 3, 1903, 32 Stat. Part 1, pp. 1083-1147 (on page 1119)

In this connection it should be noticed that the Act of Congress of June 19, 1878, (20 Stat. 169) purports to repeal Section 20 of the Act of Congress of July 1, 1862, (12 Stat. 489), and the Act of Congress approved June 25, 1868, (15 Stat. 80), relating to the administration of the railroads, and reports thereby known as the "Pacific Railroads."

It is stipulated that all Committee Reports and debates in Congress, as appearing in the official printed copies of the Congressional Globe or Congressional Record, and other proceedings in Congress which appear in any recognized Official Reports, relating to the enactments of the Acts of Congress approved July 25, 1866, June 25, 1868, April 10, 1869, May 4, 1870, January 31, 1885, and September 29, 1890, shall be treated as offered and received in evidence, subject to the defendants' right to object to all or any part thereof as incompetent, irrelevant, and immaterial. There is a like stipulation as to the decision of the Supreme Court in *Holliday vs. Elliott*, 8 Ore. 81.

EXHIBIT No. 16 to Stipulation, (Vol. IV, pp. 1725-1729) is admitted to contain a correct statement of the stock quotations therein set forth, and shows the stock quotations of the Central Pacific Railroad Company, from October 1, 1886, to December 1, 1888.

In addition to such testimony as is thus stipulated, the United States called witnesses who testified substantially as follows:

W. W. COTTON: to the effect that on December 8, 1911, he was Secretary of the Oregon and California Railroad Company, and had been such since September 15, 1904; that his predecessor was Geo. H. Andrews; as Secretary he had custody of the corporate records of the company, and that these records consisted of six volumes, Volume I commencing March 17, 1870, and Volume VI ending with the meeting of April 10, 1906. These volumes were identified by the witness, and delivered to his clerk for use of counsel for the Government, in this case, it being stipulated that no question would be raised as to the identification thereof. Mr. Cotton also testified that he had in his custody the corporate records of the Oregon Central Railroad Company, West Side, and Oregon Central Railroad Company, East Side, and that he would deliver all these records to his clerk, L. F. Steel, who had personal charge thereof. The witness identified all these records, and thereupon it was stipulated that no question would be raised as to the identification thereof. (Vol. IV, pp. 1732-1735 Transcript of Record)

L. F. STEEL: produced all these records, and the complainant offered, and there was received in evidence, as "Government's Exhibit 100-A," the complete records of the Oregon Central Railroad Company, known as the West Side Company, and the complete records of the Oregon Central Railroad Company, of Salem, known as the East Side



Company, identified as "Government's Exhibit 100-B," which are hereinafter described. (Vol. IV, pp. 1735-1736 Transcript of Record)

JOSEPH GASTON: The witness gives an historical statement of the preliminary survey for a railroad from Marysville, in California, to the Columbia River, in Oregon, in 1863, his subsequent connection with Simon G. Elliott, Geo. H. Belden, and A. C. Barry; the incorporation of various railroad companies during 1863 and 1864; the activity of A. C. Barry, at Washington City, in connection with railroad legislation; the work of Gen. Bidwell and Cornelius Cole, of California, which finally led to the passage of the Act of July 25, 1866; the action of the legislature of the State of Oregon in pledging the state to pay interest on \$1,000,000 of the company's bonds, in aid of railroad construction; the action of the Legislative Assembly in passing Joint Resolution No. 13, October 10, 1866, designating the Oregon Central Railroad Company of Portland, as the beneficiary of the Act of July 25, 1866; the action of George L. Woods, then Governor of Oregon; Mr. Gaston's part in connection with the incorporation of the West Side Company; what took place in the office of the Secretary of State on October 6, 1866, when he claims these Articles of Incorporation were filed; the controversy that arose between his company and the Oregon Central Railroad Company of Salem, incorporated April 22, 1867, known as the

East Side Company; his activity in promoting the construction of the West Side line; his attempt to secure guaranty of its bonds by the City of Portland, and like guaranty of its bonds by Washington County and Yamhill County; his knowledge of the activity of the East Side Company, and the various promoters of the two companies, and the controversy between them; the literature published and circulated by these companies, and their friends; his knowledge of Ben Holladay and the work done upon both lines; his knowledge of the passage of the resolution of October 20, 1868, by the Legislative Assembly of the State of Oregon, rescinding the Joint Resolution of October 10, 1866, and designating the East Side Company as the beneficiary of the grant of July 25, 1866; the division of the people in respect to this controversy; the conduct of Senator Williams and Senator Corbett in respect to these two companies; the subsequent acquisition of the West Side Company by Ben Holladay and his associates; the support given the West Side Company by John C. Ainsworth, R. R. Thompson, C. H. Lewis, W. S. Ladd, H. W. Corbett and other residents of Portland, at that time, wholly on the West side of the Willamette River; the division in the legislature which convened in September, 1868, upon geographical and other lines, and other matters of more or less interest from an historical standpoint, relating to the commencement of railroad construction in Oregon, and the efforts of the East Side Company and West Side Company, respec-

tively, to secure the benefits of the Act of July 25, 1866.

As stated, he testified particularly as to the circumstances under which he received back from the Secretary of State, as he claims, on October 6, 1866, the incomplete and unacknowledged Articles of Incorporation of the Oregon Central Railroad Company, West Side, for it appears that at the time these Articles were delivered to the Secretary of State on that date, there was no certificate of acknowledgment, and that he himself was the notary public who certified, as of date November 16, 1866, that the first eight signers to the Articles of Incorporation executed and acknowledged the same before him on September 29, 1866; that M. M. Melvin executed and acknowledged same on October 23, 1866; George L. Woods on November 10, 1866; R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, and C. H. Lewis, on November 16, 1866, and Seth R. Hammer, a notary public, on November 20, 1866, certified that B. F. Brown and Thomas H. Cox, and J. Gaston, executed and acknowledged the Articles on November 20, 1866.

It will be recalled that House Joint Resolution No. 13, designating the West Side Company as the beneficiary of the Act of July 25, 1866, was passed on October 10, 1866, and it may well be claimed that the legislature thereby waived the defective incorporation of the Oregon Central Railroad Com-



pany, West Side, if such incorporation was defective. The legislation, if properly passed, was an act of legislation which, as to the West Side Company, impliedly repealed the formal requisites of the Incorporation Act of 1862, then in effect, and in any event the United States could not complain, and has never complained, of this irregularity. The corporation was at least a *de facto*, if not a *de jure* corporation, and remained as such until the transfer of all its property to the Oregon and California Railroad Company, on October 6, 1880, by deed sufficiently broad to convey not only the railroad line and its appurtenances, but all rights which that company at any time had in or to any grant made by the Acts of July 25, 1866, or May 4, 1870. The more serious question is whether or not the Legislative Assembly had power to pass Senate Joint Resolution No. 16, on October 20, 1868, attempting to revoke the declaration made by House Joint Resolution No. 13, passed October 10, 1866, designating the Oregon Central Railroad Company, West Side, and by Senate Joint Resolution No. 16 attempting to designate the Oregon Central Railroad Company, East Side, as the company entitled to the benefits of the Act of July 25, 1866.

Politics figured extensively, during the year 1866, and up to and including the year 1870, in all these matters, as the records show. H. W. Corbett was elected United States senator by the legis-

lature of 1866; George H. Williams was then United States senator, elected in 1864, and was a candidate for re-election at the expiration of his term, which would take place, if at all, in 1870; J. S. Smith, who resided at Portland, Oregon, then located on the west side of the Willamette River, was elected to Congress in June, 1868, and he was one of the incorporators of the West Side Company, and although a Democrat, co-operated with H. W. Corbett, R. R. Thompson, J. C. Ainsworth, S. G. Reed, and C. H. Lewis, as the leading spirits on the west side of the Willamette River, at Portland, desiring to promote the West Side Company. J. H. Mitchell was one of the original incorporators of the West Side Company, in co-operation with George L. Woods, then Governor of the state, but he afterwards united with J. S. Smith, J. H. Moores, I. R. Moores, and Samuel A. Clark, representing the Salem interests, in the incorporation of the Oregon Central Railroad Company of Salem, (East Side Company) on April 22, 1867. Governor Woods had actively co-operated with Mr. Gaston in the incorporation of the West Side Company, and Mr. Gaston testified, in substance, that H. W. Corbett, W. S. Ladd, and Governor Woods, appeared before the House prior to the passage of House Joint Resolution No. 13, and all made speeches or statements in favor of its passage. Governor Woods wrote a special message in relation to the railroad grant tendered by the Act of July 25, 1866, and a selected committee of the

House, as shown by the House Journal of 1866, through its chairman, Mr. Foudray, of Jackson County, made an extended report, (Vol. IV, pp. 1821-1831 Transcript of Record) and reported therewith House Bill No. 78, which was passed October 24, 1866, (Session Laws 1866, pages 3-5) This report presents an interesting picture of the situation in western Oregon at that time, and the need of a railroad such as contemplated by the Act of July 25, 1866. The Committee, among other things, says: (Vol. IV, p. 1827 Transcript of Record)

“We come now to consider a definite proposition. Through the efforts of a few of our citizens, acting in conjunction with some railroad capitalists of California, and aided by the Pacific Coast delegation in Congress, a grant of twenty sections of public land per mile has been secured from Congress to aid in constructing a line of railroad from Portland, Oregon, to the Central Pacific Railroad in California. It is made the duty of this legislature to designate the company which shall receive and manage so much of this land grant as lies within the State of Oregon. In view of these facts the following named gentlemen have incorporated themselves under the general incorporation law of this state, to-wit: J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, Edward R. Geary, S. Ellsworth and H. W. Corbett, under the name and style of “The Oregon Central Railroad Company,” for the purpose of re-



ceiving the said grant of land, and using it so far as it may go, towards the construction of the proposed railroad, passing through the Willamette, Umpqua and Rogue River Valleys. Under present circumstances, the land is not available for the purpose of raising money, one of the grant conditions being that twenty miles of railroad must be finished and put in operation before the government patent will issue for the land. \* \* \* It is proposed by the Oregon Central Railroad Company, that if the legislature will levy and appropriate whenever a section of twenty miles of railroad is finished and put in operation, a sum of money sufficient to pay the interest on \$500,000 of the company's bonds; and whenever one hundred miles is finished and put in operation, the additional sum sufficient to pay the interest on another \$500,000 of the company's bonds, and so pay this interest for twenty years, and also loan the company the sum of \$10,000 for preliminary contingent expenses, the whole amount to be secured by a mortgage of all the company's property to the State, and to be returned at the expiration of the twenty years, then this Company agrees to proceed at once to the work of constructing the road. After fully considering the matter, your committee are decidedly in favor of the proposition and have reported the accompanying bill to carry the same into effect." (Referring to House Bill No. 78 above mentioned.)

S. S. MARR, a witness on behalf of complainant, testified (Vol. IV, pp. 1848-1860, Transcript of

Record), that he was law examiner in the General Land Office and continuously in the Railroad Division thereof since May 1, 1877, and that

“The work of determining that the land was free from all claims was the work of the Railroad Division, and that Division first determined whether it was within the limits of the grant at all. After witness came into the office it was determined by the office whether the railroad had been constructed opposite the lands claimed, and whether the lands had been earned. Prior to that time this had not been done. It frequently happened that there was land, particularly under the old state grants, which the office certified without knowing whether the road was constructed at all, and that happened so in the other grants, too, sometimes; witness thinks that this was avoided when he came in the office in 1877. The office then determined that the road was constructed opposite the land and it ought always to have been done so. The office determined whether there were conflicting homestead, pre-emption or other claims of record; that is any claim under the public land laws of the United States, or any other laws of the United States, or any private claim, or anything else that conflicted with that grant. In the examination of those grants, if they found there was a claim existing to that land, either at the date of the grant or at the date of the definite location of the road, then they would cut that tract out of the list. That would defeat the grant, even though the land might have been free at the time of the selection or listing by

the company. If it was covered by some claim at the date of the grant or at the date of the definite location, it ought not to pass under the grant. These are what the office calls present grants, and when the line of the road is definitely located, then the grant attaches in the primary limits; and whatever is free and clear and of the character of the lands intended to be granted, passed at the time of the definite location of the road, or did not pass at all. In the indemnity limits, the right accrued on selection, and it did not make any difference what the previous condition of the land might have been if it was clear at the time of the selection; but in the primary location, that land must have been free at the date of the grant and at the date of the definite location. Witness does not think that outside of the several things mentioned by him that the Railroad Division determined anything else. When these things were all determined in favor of the Railroad Company, the list was submitted to the Secretary, with recommendations that it be approved. (Vol. IV, pp. 1854-5-6, Transcript of Record).

The witness testified, over the objection of defendants that the same was immaterial and incompetent, that since he had been identified with the Railroad Division in 1877, the Railroad Division had never, in recommending a list or selection for patent, considered or determined whether any of the alleged conditions subsequent annexed to the grant had been violated; that after the de-



cision of the Supreme Court in *Schulenberg v. Hariman*, the Department of the Interior, and particularly the Railroad Division of the General Land Office, for a short period only along in the early 80's, when there was a question as to looking to the forfeiture of these grants, directed that patents should not be issued under railroad grants where the road had been constructed after the time prescribed in the law when it should have been constructed, but this was afterwards set aside, that is in the early 80's they were instructed by the Department of the Interior not to issue patents for lands to railroad companies which constructed the railroad after the time prescribed; he recalls that at that time there were many acts pending in Congress for the forfeiture of those grants, some general acts as to all grants, and a great many acts relating to specific grants, and that the order of the secretary in most instances referred to the fact that legislation was pending, and no patent should be issued until Congress had acted,—this was set forth in *Donaldson's Public Domain*; in fact, the Act of March 3, 1887, was under consideration some time before it was passed, and the General Forfeiture Act of September 29, 1890, was under consideration for some time, but he does not remember how long. He had always attempted to ascertain, since he had been connected with the Railroad Division, whether the roads claiming lands under these land grants had constructed their roads opposite to and coterminus with the lands

applied for, and he thinks that this rule has not been departed from since he has been with the Railroad Division. For a time he was instructed not to approve for patents lists applied for where the roads were not constructed within the time, although at the time of the application for patent the road had been constructed passed or opposite to and co-terminus with the lands; and that was particularly from the time these acts introduced in Congress were first introduced up to September 29, 1890, when the General Forfeiture Act was passed, that that practice prevailed.

J. F. CASEY, a witness on behalf of complainant, testified, (Vol. IV, pp. 1861-1887, Transcript of Record), that he had been employed in the Railroad Division of the General Land Office since about March 4, 1911, but had been employed in other divisions of the General Land Office for about four years, between 1889 and 1893, and had been continuously in the General Land Office since 1893. That under the act of July 25, 1866, no lists or selections were made except in the name of the Oregon and California Railroad Company; under that Act lists and selections were made in the general form of List No. 1 (Government's Exhibit 111), dated July 12, 1870. Beginning on or about June 17, 1876, the selections and lists were upon the general form of List No. 8 (Government's Exhibit 111-A). From the year 1885 the selections and lists were upon the general form of

List No. 16 (Government's Exhibit 111-B), and that form continued until November 19, 1888, when the lists and selections were in the general form of List No. 17 (Government's Exhibit 111-C). On September 15, 1904, and thereafter, the selections and lists were in the general form of List No. 104 (Government's Exhibit 111-D). On June 15, 1908, the lists and selections were in the general form of List No. 106 (Government's Exhibit 111-E); on September 21, 1908, and since that time, lists and selections have been in the general form of List No. 116 (Government's Exhibit 111-F). All lists and selections upon which patents have been issued under the Act of May 4, 1870, were made in the name of the Oregon and California Railroad Company. The corrective patent issued on June 21, 1909, was issued as "Supplemental Patent No. 3 for 161.75 acres of land covered by selection List No. 2 of September 23, 1871," to the Oregon and California Railroad Company. The records show that this matter was referred to Mr. Lord, an employe of the Railroad Division, who prepared the letter transmitting the patent to the Recorder for signature. Mr. Lord is now dead. Every one knew that this suit, (referring to this suit commenced September 4, 1908), was pending, but witness could not tell whether Mr. Lord knew it. It was Mr. Lord's duty to know about the issuance of patents and to take orders as to refusal to issue further patents, and if there was a suspension of the further issuance of pat-



ents on account of this suit, or for any other reason, Mr. Lord would be apt to have knowledge of it; he would get that knowledge just like the rest of the other employes in the office; that is, unless he was told unofficially, there would be an order issued. The original letter of Secretary Delano to the Commissioner of the General Land Office dated June 5, 1872, is not in the files in the General Land Office, and he cannot tell where the original is. It would probably be in these files. He could not tell why the original letter of Secretary Delano addressed to Commissioner Drummond should be in the Secretary's office and not in the Commissioners' office (referring to Government's Exhibits 109, 109-A, 109-B, 109-C, 109-D, Vol. X, pp. 5322-5373). In the jacket he found an original autograph letter of George H. Williams, written on stationery "Department of Justice, Washington, April 20, 1872", addressed to Hon. Willis Drummond, Commissioner of General Land Office, Washington, D. C., and that was the only enclosure in Jacket No. 92,880 at that time, and these three jackets were the only ones that he found anywhere in the office or files of the General Land Office, or the files of the office of the Secretary of the Interior, relating to this subject matter.

It was stipulated that if this witness was recalled, he would testify that the records of the General Land Office show that the forest lieu selections referred to in Exhibit No. 9 to the joint

and several answer of the defendants, were examined as to the title of the base lieu land tendered to the Government by ten different law clerks in the General Land Office during the time that they were pending in the Interior Department, and that, in so far as the titles to any of said base lands were accepted and approved by the Interior Department, as set forth in said Exhibit No. 9 to said joint and several answer, as corrected by Exhibit No. 17 to the "Stipulation as to the Facts" (Vol. II, pp. 1143-1148, Vol. IV, pp. 1730-1731, Transcript of Record), the same were approved and accepted by these law clerks, and it was further stipulated that if they were called each of them would testify that he approved the title to these base lands without actual knowledge of the provisions of the Act of April 10, 1869, or of May 4, 1870; that he passed the title after an examination of an abstract of title showing patent by the United States to the Oregon and California Railroad Company, conveyance by the latter to a certain grantee or some subsequent grantee to the United States; the patent record of the General Land Office was examined to verify the statement in the abstract as to the issuance of patent, all of which patents were recorded and of record at length in the General Land Office; the tract books were then examined to ascertain that the lands tendered as base had not been used before for the same purpose, and to ascertain generally whether the lands tendered were proper base for the selec-

tions tendered; each of said law clerks passing upon these titles then approved the title, assuming that the patent created an unconditional and unrestricted title, and without examining the granting acts, and without actual personal knowledge of the provisions of the Act of April 10, 1869, or the Act of May 4, 1870; after the title to the base lands tendered had been examined in this manner, the selection was referred to the several divisions of the General Land Office to ascertain if the selected lands were subject to any prior adverse right; after the selection had been approved by each division, it was referred to the Chief of the Forest Lieu Division, with the certificates of all of the law clerks and other employes who had examined and approved the selection; the Chief of the Forest Lieu Division then approved the selection without special examination of any of the subjects investigated by the law clerks and chiefs of the several divisions; in reliance upon the approval of the latter, the selection was then approved by the Commissioner of the General Land Office, and in like manner approved and patent ordered issued by the Secretary of the Interior.

All this testimony, excepting as to the approval by the Secretary of the Interior, was received under the objection of the defendants that the same was incompetent, irrelevant and immaterial and upon the ground particularly that such testimony cannot be considered to impeach, qualify or limit the



action of the Secretary of the Interior, or of the United States acting by and through him as such Secretary.

FRANK GRIFFITH, called as a witness on behalf of complainant, testified, (Vol. IV, pp. 1879-1902, Transcript of Record), that he had been in the employ of the Government since 1899 in the Interior Department, under assignment to the attorneys for the Government in connection with public land cases, and that he had examined the files of the office of the Secretary of the Interior and the General Land Office with reference to all correspondence and documents relating to land grants of the Oregon and California Railroad Company involved in this suit, and that he found among the files of the General Land Office and the office of the Secretary of the Interior the correspondence which has been introduced in evidence in this case as Government's Exhibit 109, and this exhibit, together with the other documents that have been introduced in evidence by the defendants in connection therewith, constitute all of the letters, files and other records relating to that question which are on file in the office of the Secretary of the Interior and the General Land Office; that during the early administration of the Oregon and California Railroad Company land grants, George H. Williams, both while he was in the Senate and was Attorney General for the United States, acted as the medium of communication between the rail-

road company or its officers on the one hand, and the Interior Department, or the Commissioner of the General Land Office on the other part, and that he would say that he found about forty-five communications which were presented to the Commissioner of the General Land Office or the Secretary of the Interior by George H. Williams which emanated from the Oregon and California Railroad Company, or its officers, relating to these grants, and they related to every subject connected with the road, including filing maps of location, etc., of lands, issuance of patents, and subjects of that kind.

It was stipulated that Richard Koehler if called as a witness by the complainant, would testify (Vol. IV, pp. 1908-09, Transcript of Record), that the Southern Pacific Company is solvent and financially responsible and able to pay all outstanding bonds of the Oregon and California Railroad Company guaranteed by Southern Pacific Company, as set forth in the pleadings and shown by the evidence in this case.

All of the exhibits on behalf of the Government are printed in full in the record beginning with Government's Exhibit 100-A, Vol. IX, page 4285, Transcript of Record, and ending with Government's Exhibit 130, Vol. XI, page 5766, Transcript of Record. The letter contained in the exhibit last named being set out in full in Volume IV, pages 1910-1920, Transcript of Record.

Government's Exhibit 100-A consists of the minute books of the Oregon Central Railroad Company of Portland, Oregon, (West Side), Volumes I, II, III and IV, commencing with the first meeting of the stockholders May 24, 1867, and ending with the last meeting of the Board of Directors May 27, 1895, and being the whole of Volume IX, Transcript of Record. A complete index of this volume is found in Volume XVII, pages 8721-8738, Transcript of Record. The record constitutes an interesting narrative of the corporate action of the West Side Company, containing among other things, a record of a communication of date August 15, 1870, from Ben. Holladay as President of the Willamette Valley Railway Company, proposing to purchase all the right, title and interest of the Oregon Central Railroad Company in and to the Act of May 4, 1870; the resolution accepting this proposition (Vol. IX, pp. 4425-4427, Transcript of Record); the action of the directors on April 17, 1871, accepting transfer from Willamette Valley Railway Company on that date to the Oregon Central Railroad Company of the properties granted by the Act of May 4, 1870, (Vol. IX, p. 4439, Transcript of Record); a copy of deed of date April 17, 1871, from Willamette Valley Railway Company to Oregon Central Railroad Company, (Vol. IX, p. 4457, Transcript of Record); copy of mortgage of July 15, 1871, executed by Oregon Central Railroad Company (West Side) to Milton S. Latham and Faxon D. Atherton, (Vol. IX, p.



4477, Transcript of Record) ; the recorded fact that a copy of the resolutions authorizing the sale and conveyance of the property of the Oregon Central Railroad Company (West Side), including all lands granted under the Act of May 4, 1870, was forwarded to the Secretary of the Department of the Interior at Washington, D. C., and mailed presumably on or about August 15, 1870, (Vol. IX, p. 4430, Transcript of Record), and that a like copy of the resolution accepting the transfer and conveyance made by the Willamette Valley Railway Company on April 17, 1871, to the West Side Company was also forwarded to the Secretary of the Interior at Washington, D. C., about that date, (Vol. IX, p. 4456, Transcript of Record). These facts are pertinent as showing that the United States had notice on August 15, 1870, of the sale and conveyance of the granted lands made to the Oregon Central Railroad Company (West Side) under the Act of Congress of May 4, 1870, as early as about August 15, 1870, and had notice of the sale and re-conveyance of the same by the Willamette Valley Railway Company to the West Side Company on or about April 17, 1871, and that the conveyance of the entire grant in each case was *in solido*, and, of course, without any regard to the provisions of the "actual settlers" clause of April 4, 1870.

The minute books also show that on October 6, 1880, the Oregon Central Railroad Company ac-

cepted the proposition of the Oregon and California Railroad Company to purchase all the property of the former company, (Vol. IX, p. 4869-4872, Transcript of Record), and that a deed on that date conveying all the property of the West Side Company to the Oregon and California Railroad Company, including the lands granted under the Act of May 4, 1870, was authorized, which deed, it is stipulated, (Vol. IV, p. 1561, Transcript of Record, Item 5) was on that date executed by the West Side Company and delivered to the Oregon and California Railroad Company, a correct copy of which is attached to the bill of complaint as Exhibit "C" (Vol. I, pp. 126-131, Transcript of Record), and a certified copy of which was filed with the Secretary of the Interior of the United States on or about August 20, 1880, and from which deed and the resolution authorizing its execution, it appears that all the property of the West Side Company was for a valuable consideration sold, together with the lands granted under the act of May 4, 1870, to the Oregon and California Railroad Company, and that these lands were sold *in solido*, and of course without any regard to the "actual settlers" clause of section 4 of the Act of May 4, 1870.

Government's Exhibit 100-B (Vol. X, pp. 4893-5129, Transcript of Record), consists of the minutes of the Oregon Central Railroad Company of Salem, (East Side), beginning with the first meet-

ing of the incorporators on April 22, 1867, and ending with the meeting of the stockholders on March 28, 1870.

A part of Government's Exhibit 100-B consists of the stock book from the records of minutes of the Company, (Vol. X, pp. 5122-5145, Transcript of Record). These minutes constitute all of the records of the Oregon Central Railroad Company (East Side), and is an interesting narrative of the corporate action of that company, and shows the adoption of resolution authorizing the construction contract of April 23, 1867, with Albert J. Cook, (Vol. X, pp. 4906-07, *supra.*); form of bond adopted same day, and resolution authorizing execution of first mortgage on first 150 miles adopted April 23, 1867 (Vol. X, p. 4918, Transcript of Record); the Supplemental Agreement to the construction contract with A. J. Cook & Co. on November 27, 1867, (Vol. X, p. 4922, Transcript of Record); modified construction agreement of May 12, 1868, with A. J. Cook & Co. (Vol. X, p. 4989, Transcript of Record), and supplemental construction contract with A. J. Cook & Co. of June 10, 1868, (Vol. X, p. 5004, Transcript of Record); committee report recommending transfer of the contracts of A. J. Cook & Co. to Ben Holladay September 16, 1868, (Vol. X, p. 5016, Transcript of Record); resolution assenting to the Act of Congress of July 25, 1866, adopted November 25, 1868, (Vol. X, pp. 5026-27, Transcript of Record), which resolution is as follows:



“Whereas the Legislature of the State of Oregon, at its late session in Oct. 1868, by Joint Resolution designated “The Oregon Central Railroad Company”, of Salem, Oregon, Incorporated April 22d, 1867 under the laws of Oregon, as the Company to take, manage & control the Land Grant given in aid of the construction of a railroad & telegraph line from Portland, Oregon, Southerly through the Willamette, Umpqua & Rogue River Valleys, by Act of Congress of date July 25th, 1866;

“And Whereas such Legislature failed to designate any company until after the expiration of one year from the date of the passage of said Act of Congress,

“Therefore, RESOLVED, that this Company—The Oregon Central Railroad Company of Salem, Oregon,—Organized April 22d, 1867, does hereby accept such grant, and does assent thereto, upon the terms and conditions specified in said Act of Congress of July 25th, 1866, granting aid as aforesaid.

“AND RESOLVED FURTHER

“That the Secretary of this Company be & he is hereby instructed to prepare a true & certified copy of this preamble & resolution, together with a certified copy of such Joint Resolution, being known as Senate Joint Resolution No. 16, under the seal of this company, & forward the same forthwith to the office of the Secretary of the Interior, and have the same filed in such office as the assent of this Company to the grant aforesaid.”

The minutes also show communication from Ben Holladay & Company of September 7, 1869 (Vol. X, pp. 5059-61, Transcript of Record) as to purchase of the properties of the Oregon Central Railroad Company (East Side); the action of the Board of Directors upon the proposition of Ben Holladay & Co. of date March 28, 1870 (Vol. X, p. 5072, Transcript of Record), as to settlement with the Oregon Central Railroad Company; the offer of the Oregon and California Railroad Company of date March 28, 1870, to purchase the properties of the Oregon Central Railroad Company, including its land grant (Vol. X, p. 5083, Transcript of Record); the agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company dated March 28, 1870, (Vol. X, p. 5095, Transcript of Record), and resolution of that date authorizing the sale and transfer of the property of the Oregon Central Railroad Company (East Side) to the Oregon and California Railroad Company, (Vol. X, p. 5107, Transcript of Record); the stock book of the East Side Company (Vol. X, p. 5122, Transcript of Record), and the registered bonds of that company, Series "A", (Vol. X, p. 5129, Transcript of Record).

It appears that on March 28, 1870, the board of directors of the Oregon Central Railroad Company (East Side), (Vol. X, p. 5120-21, Transcript of Record) adopted the following resolution:

“RESOLVED, that the President and Secretary of this Company be and they are hereby instructed to communicate to the Secretary of the Interior, the fact that this Company has sold, assigned, transferred and conveyed to the “OREGON AND CALIFORNIA RAILROAD COMPANY”, of Portland, Oregon, all its right, title and interest, in and to the lands, franchises and benefits granted to the “Oregon Company by the Act of Congress of July 25th, 1866, and amendments thereto, granting lands to aid in the construction of a rail road and telegraph line from the Central Pacific Rail Road in California to Portland in Oregon.”

The conveyance executed by the Oregon Central Railroad Company (East Side) of date March 29th, 1870, to the Oregon and California Railroad Company is referred to in the bill of complaint, and made a part thereof, as Exhibit “B” (Vol. I, pp. 93-125, Transcript of Record), and it is stipulated (Item 17, Vol. IV, p. 1558, Transcript of Record) that this deed was on that date delivered to the Oregon and California Railroad Company and recorded in the office of the County Recorder of the several counties in which was situated any part of the lands intended to be granted by the said Act of Congress of July 25th, 1866, and, (Item 18, *supra*,) that on April 4, 1870, the Oregon and California Railroad Company adopted a resolution, reciting the purchase under this deed of all the property of the East Side Company, including the lands granted under the Act of July



25th, 1866, and amendments thereto, accepting the grant conferred thereby, directing its president and secretary to file the assent of the company thereto in the office of the Secretary of the Interior by filing a copy of the resolutions certified under the seal of the company and signed by the president and secretary respectively, and therewith a copy of the deed, and that on April 28, 1870, the Oregon and California Railroad Company filed in the office of the Secretary of the Interior an authenticated copy of this resolution and a certified copy of the deed of March 29, 1870 (Vol. I, pp. 26-28, Transcript of Record). This deed on its face purports to be a sale of all of the property of the East Side Company, including its land grant, to the Oregon and California Railroad Company, and the land grant is conveyed *in solido*, and of course without regard to the so-called "actual settlers" clause of the proviso of the Act of April 10, 1869, and the filing of certified copy of this deed in the office of the Secretary of the Interior of the United States is undoubted notice to the United States of the disposition and sale of this land grant in the manner indicated.

Governor Woods, in his special message to the Legislative Assembly on October 6, 1866, (Government's Exhibit No. 101, Vol. X, pp. 5146-5150 Transcript of Record) says:

"With a railroad running through the Willamette Valley, and via Oakland, Roseburg,

Jacksonville and Yreka, to and connecting with the Central Pacific Railroad in California—thus putting ourselves in direct and speedy communication with the City of San Francisco, and the demands of our sister State, in which we have a community of interest—we should reap a benefit which cannot well be estimated. \* \* \* In his biennial message for the year 1864, my predecessor called the attention of the Legislature to the route first above named, and forcibly enumerated the advantages to be derived from such an enterprise; and, in accordance with the suggestions, an Act was passed, the effect of which was to aid in its construction. (Session Laws 1864, page 76. ) But the amount provided for was so meager as to offer no inducement to capitalists for investment. \* \* \* Your attention is called to an Act of Congress of July 25, 1866, donating twenty sections of the public lands for each mile of Railroad and Telegraph to be constructed from the City of Portland, Oregon, to, and connected with the Central Pacific Railroad, in California, which lands are to be selected within thirty miles on either side of said road. *This grant, though quite liberal is wholly inadequate and will not, of itself, afford sufficient security to insure investment. Capital for the completion of this great work must come from abroad, and good policy requires that we should hold out inducements for investment.* I am happy to be able to communicate to you that capitalists controlling ample means for the construction of the entire road proposed, are now ready,

and have signified their willingness to invest in the great enterprise as soon as the legislation necessary for such an investment can be had. \* \* \* Under the General Incorporation Act, a corporation is about to be organized to be known as "The Oregon Central Railroad Company," composed of some of the most responsible and energetic business men of the state, whose purpose it is, if they can meet with proper encouragement, to immediately begin this great work. And I take the liberty to suggest that it would be well to make provision, by immediate enactment, by which through the above named corporation the State shall be able to reap the benefits of the liberal donations by Congress, and also to make provision for the payment of the interest on the bonds of the Company, necessary to construct and put into operation, the first section of twenty miles of the road. \* \* \* A railroad is a public necessity. The farmers need it; the mechanics need it; the merchants need it; the manufacturers need it; all classes need it."

On January 1, 1868, (Government's Exhibit No. 102, Vol. X, pp. 5151-2 Transcript of Record) the Oregon Central Railroad Company, West Side, issued a circular in the name of its officers, J. Gaston, President, and A. C. Whitson, Secretary, giving notice to the public, among other things stating:

"1st.—The Oregon Central Railroad Company was incorporated and organized at the session of the Legislature held in September,



1866, and received valuable grants of U. S. land, and interest on bonds from the State of Oregon. Since that time it has duly filed its papers in the office of the Secretary of the Interior at Washington, D. C. and is now engaged in the location and construction of its railroad, having large subscriptions of home means."

On May 1, 1868, (Government's Exhibit No. 103, Vol. X, pp. 5153-7 Transcript of Record) Mr. Gaston, as President, and T. R. Cornelius, W. T. Newby, J. C. Ainsworth, W. C. Whitson, and J. Gaston, as Directors of the West Side Company, issued another circular which it is stated was sent everywhere, stating, among other things,

"1st.—The original "Oregon Central Railroad Company" was the only corporation in this state entitled to use this name, was incorporated under the General Incorporation Act of this state, at the session of our legislature for the year 1866; and at that time went before the legislature then in Salem, and procured the passage of House Joint Resolution No. 13, which designates this company to receive all the land, and all the benefits of an Act of Congress, entitled, "An Act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon," so far as the land grant is located in Oregon. (This Act of Congress gives the Company about three million acres of land) Our Company has filed the necessary papers in the De-

partment of the Interior at Washington, and has been officially recognized by the Secretary of the Interior. The legislature of our state, at the same session named, passed an Act pledging the state to pay interest on one million dollars of our bonds for twenty years. After receiving these grants from the state, and the recognition of our rights to the land grant, by the Secretary of the Interior, we commenced surveying our line of road upon the west side of the Willamette River, and solicited subscriptions to the capital stock of the Company, and we now have subscriptions and donations of land, cash and other valuable property in aid of the road, amounting in value to near \$300,000. In February last, the City Council of the City of Portland, upon the petition of nine-tenths of the voters of the City, passed an Ordinance, binding the City to pay interest on \$250,000 of our bonds, for twenty years, all deliverable on the first twenty miles of road. In March last, the County Commissioners of Washington County, upon the petition of four-fifths of the farmers, entered into a contract, obligating the County to pay interest on \$50,000 of our bonds. On the 15th ult. we "broke ground" in the commencement of our work, and a force is rapidly pushing the work. We submit that these facts, showing our standing at home, should give us a fair name abroad."

Government's Exhibits Nos. 104 and 105, (Vol. X, pp. 5158-5227 Transcript of Record) appear to be copies of published pamphlets issued by the

Directors of the Oregon Central Railroad Company, East Side, between May 1, 1868, and November 25, 1868, respectively, stating the contentions of the East Side Company in respect to the controversy with the West Side Company. These pamphlets were apparently issued in reply to the circular of January 1, 1868, (Government's Exhibit No. 102) and of May 1, 1868, (Government's Exhibit No. 103) issued by the West Side Company, under the dominance of Joseph Gaston, and which circulars were presumably written by him. The pamphlet of date May 1, 1868, (Government's Exhibit No. 104) was probably written by John H. Mitchell, then the attorney for the East Side Company, who probably wrote the pamphlet marked Government's Exhibit No. 105, which was published on or about November 25, 1868, as appears from the resolution of the Board of Directors of the East Side Company, of that date, adopting the statement of facts therein. In this "Statement of Facts," (Government's Exhibit No. 105) the East Side Company claimed "to be entitled to the control and management of the land grant given in aid of a railroad and telegraph line in Oregon, by virtue of being designated as such corporation by joint resolution adopted by the Legislature of the State of Oregon, in October, 1868." In the course of this "Statement of Facts" this language appears:

"Now we freely admit that if the Gaston or West Side corporation was organized, or in being at the date of the adoption of the



joint resolution of October 10th, A. D. 1866, and such resolution referred to such corporation, then in existence, that then the claim of that company, as to vested rights, might be good; provided, it was free from fraud; and, provided further, such company had adopted a route in accordance with the requirements of the Act of Congress, which they did not, as we shall subsequently show."

The charge of fraud is predicated upon an alleged "secret fraudulent agreement" of date November 16, 1866, between Gaston and five of the ten persons whose signatures he obtained to the Articles of Incorporation of the West Side Company, prior thereto. (Vol. X, pp. 5196-5198 Transcript of Record) It is claimed that this secret agreement was thus signed after the legislature of 1866 had adjourned, and that this agreement was before the Senate in September, 1868. At the time there was under consideration the passage of Senate Joint Resolution No. 16, attempting to repeal House Joint Resolution No. 13, passed October 10, 1866. It is claimed that on November 16, 1866, two of the eight original incorporators, then residing at Salem,—J. S. Smith and I. R. Moores—upon discovery of the alleged fraudulent agreement filed new Articles of Incorporation under the name of "Oregon Central Railroad Company," four days prior to the filing of the Articles of the West Side, or Gaston, Company. These Articles of Incorporation are set out in Vol. X, pp. 5199-5201 Transcript

of Record. Nothing further was done under the same, and thereupon the East Side Company, on April 22, 1867, was organized.

“We do, therefore, feeling implicit confidence in the enterprise in which we are engaged, and in the justness of our claim to the Congressional land grant, most respectfully submit this statement of facts, and reasons why “The Oregon Central Railroad Company,” of Salem, Oregon is entitled to the grant referred to, to the exclusion of all others, to all persons, and to all officers and Departments of Government, that may be interested in relation to the same, in having justice and right prevail.”

Thereafter, on January 9, 1869, the West Side Company pursuant to the action of its Board of Directors taken December 28, 1868, authorized the publication of reply to the pamphlet issued by the East Side Company, last mentioned, and the same is known in this record as Government's Exhibit 106. (Vol. X, pp. 5228-5291 Transcript of Record) This pamphlet purports to answer the contention made by the East Side Company in its pamphlet of November 25, 1868, known in this record as Government's Exhibit 105. (Vol. X, pp. 5176-5227) It bears inherent evidence that it is the joint production of Joseph Gaston and W. Lair Hill, who apparently represented the West Side Company in the suit brought by that company against the East Side Company, before R. P. Boise, Judge of the

Circuit Court for the Third Judicial District. Judge Boise, who was for more than forty years one of the ablest *nisi prius* judges of the State of Oregon, and during that time for many years a Justice of the Supreme Court of the state, in the case mentioned overruled the demurrer of the East Side Company to the complaint of the West Side Company, in a brief opinion, as follows:

“At the time the Act of Congress was passed, neither of the rival companies was in existence, and the objection made to the Resolution of the Legislature could be made with equal force to the Act of Congress; but I think the language of both the Act and the Resolution may as well refer to a company yet to be incorporated as to one already organized. \* \* \*

The plaintiff says in its bill that the defendant, through its agents and officers, has represented that it, and not the plaintiff, is entitled to the benefit to be derived from a compliance with the Act of Congress, to the injury and depreciation of plaintiff's credit. The defendant must be required to answer whether these things be true.”

(Vol. X, p. 5240 Transcript of Record)

We quote further from this pamphlet:

“But we not only claim the benefits of the land granted by Congress, upon the basis of a perfect *de facto* corporation to receive a grant under the Statutes of Oregon, at the date of the passage of the Joint Resolution by the Legislature of 1866; but we claim that the



East Side Company is totally mistaken, when they assert that it was necessary to the reception of the grant, at that time, that the company be perfectly organized."

We quote the language of W. Lair Hill, set out in this statement, as follows:

"This Land Grant act of Congress was not like the Oregon Donation Law of 1850, a grant of land to this company. It was merely an agreement to grant to such corporation as the legislature should "designate", upon compliance with certain specified conditions, namely, filing an "assent" prior to July 25th, 1867, and building twenty miles of railroad and telegraph line; and upon certain other terms directly beneficial to the United States. Neither was it in the power of the legislature of this state to grant the lands to any corporation; that body could only say what company should have the right to accept the terms, perform the conditions, and afterwards receive the grant proposed by Congress. This is not an artificial construction of the language of the Act of Congress, but its plain import and intention—an interpretation which would always be given to it by a court—and the only interpretation of which it will admit.

"There is then nothing in the wording of the law, nor in the subject matter, inconsistent with the idea that Congress intended to include and did include in the provisions of the Act, as well a corporation not in esse, as one already organized, provided the State Legislature should "designate" such corporation, and it

should afterwards organize and perform the required conditions. If this is not the meaning of the Act of Congress, then neither of the companies can take the benefit of the grant, for neither of them was in existence when the Act was passed. \* \* \* The West Side Company, and they alone, having accepted the terms proposed by the Act of Congress, as required, having been designated, identified, pointed out, by the Legislature of 1866—having filed their “assent” within the year—having gone on in the performance, on their part, of these terms—will be entitled to the grant whenever they have performed the conditions annexed; and any attempt by Congress to confer the benefits of the Act of 1866 upon any other company, would be, in law as well as in fact, a denial and repudiation of its own agreement.”

From this same pamphlet we quote:

“The West Side Company, and they alone, solicited of Congress an extension of the time limited in the grant for the construction of the road; and if it had not been for this extension (thanks to the Oregon delegation in Congress) the land would all have been forfeited. As witness Senators Williams and Corbett and Representative Mallory, of Oregon, and Representative Hubbard, of West Va.”

(Vol. X, p. 5247 Transcript of Record)

An argument supporting the feasibility of the located line of the West Side Company, is set out Vol. X, pp. 5253-5255 Transcript of Record. A

succinct history of the organization of the Oregon Central Railroad Company, West Side, is set out in the record at Vol. X, pp. 5272-5283.

The pamphlet also attempts to set out the "Origin and History of the Holladay Company," as the East Side Company is designated in this pamphlet. (Vol. X, pp. 5283-5288, Transcript of Record.)

S. G. Reed, apparently representing himself, but really representing the West Side Company, wrote an address and remonstrance to the Congress of the United States, entitled, "Remonstrance against extending the time for filing assent to the act granting lands to the Oregon Central Railroad Company," and therewith proposed a substitute for the bill pending. (Government's Exhibit No. 107, Vol. X, pp. 5292-5297 Transcript of Record) The proposed substitute for the pending bill, which accompanied this remonstrance, was intended to validate the action of the Legislative Assembly of the State of Oregon in passing House Joint Resolution No. 13, October 10, 1866, designating the Oregon Central Railroad Company as the company entitled to the benefits of the Act of July 25, 1866, and ratifying its Act of July 6, 1867, whereby the West Side Company filed its assent to that Act. Thereafter S. G. Reed, representing the West Side Company, prepared certain written objections to the passage of Senate Bill No. 94 (which was intended to amend the Act of July 25, 1866. (Government's Exhibit



No. 108, Vol. X, pp. 5298-5321 Transcript of Record) This bill was introduced by Senator Williams, and was in harmony with the opinion of O. H. Browning, then Secretary of the Interior. Both Senator Williams and Secretary Browning apparently entertained a mistaken view of the nature and effect of the Act of July 25, 1866, the attempted designation by the Oregon legislature, by the Resolutions of October 10, 1866, and October 20, 1868, *supra*, and the legal effect of the action of the two companies under the Act of Congress and these respective resolutions. It was an apparent attempt upon the part of Senator Williams and Secretary Browning to do a wholly unnecessary thing,—pass some legislation to review a grant which had vested in one or the other of these companies, and, under the so-called Reviving Statute, compel the contending companies to submit their claims to be the beneficiary of the land granted, to judicial determination. The report of the committee, (Vol. X, pp. 5319-5321 Transcript of Record) among other things says:

“Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and equities fully examined and adjudicated. To declare by Act of Congress that the east-side company shall have the grant would be unfair, for it may turn out upon investigation before

the courts that the west-side company was legally designated in 1866, in which event that company, for aught that can now be seen, would be entitled to the land. To declare by Act of Congress that the west-side company shall have the grant would be equally unfair, for it appears that the east-side company was organized and made large expenditures upon the ground that the other company was never legally designated, and it ought to have the benefits and advantages of the law in accordance with which it was organized and invested its money. \* \* \* If the west-side company was legally designated in 1866, and it has since done what the Act of Congress requires, it has a vested right to the grant, which the bill, if it becomes a law, will not and cannot disturb; but it is unreasonable to insist that because that company has failed to secure the grant, the state ought therefore to lose it. Both companies claim, and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by the sixth section of the Act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the state has more interest than in the fortunes of either company."

The proceedings in Congress with reference to this bill may be considered in evidence under the Stipulation, Vol. V, page 2531, (Transcript of Record) This report is within the judicial knowledge of the court, as though formally introduced in

evidence. Besides, it appears in Government's Exhibit 108. It is competent as tending to show that it was the intention of Congress not to disturb any vested right by any legislation then proposed, or subsequently to be enacted, and that the primary purpose of the proposed legislation was that the grant should take effect so that it might "be used for railroad purposes, in which the state has more interest than in the fortunes of either company." It is also found in the report of the Committee on Public Lands, to whom was referred the proposed bill, and under the Stipulation, (Vol. IV, pp. 1622-4

Transcript of Record) and is within the judicial knowledge of the court, even if it had not been offered in evidence in the case. "Objections to the passage of Senate Bill No. 94, urged by Mr. S. G. Reed, Agent, were objections urged by the West Side Company, and this negatives the allegation and contention made by the Government in Paragraph IV of the bill of complaint, (Vol. I, pp. 28-29 Transcript of Record) that the West Side Company never at any time abandoned or waived its claim to the grants, franchises, and benefits of the Act of Congress of July 25, 1866, but that it "did importune the Congress of the United States to extend to it, in lieu thereof, a similar grant of land, etc.," as alleged in this paragraph. The testimony is clearly to the effect that the West Side Company at all times protested against any further legislation in respect to the grant made by the Act of July 25,



1866, and never at any time waived or abandoned its legal claim to that grant. The Act of May 4, 1870, was passed at a subsequent session of Congress, which convened in December, 1869, long after the transactions referred to in Government's Exhibit No. 108. True it is, that Mr. Reed, acting for the West Side Company, at or about March, 1869, as shown by Government's Exhibit No. 107, (Vol. X, pp. 5292-5297 Transcript of Record) urged a substitute for Senate Bill No. 94, but this substitute was merely a ratification of what had been previously done in behalf of and by the West Side Company. Not content with urging the remonstrance mentioned, Mr. Reed submitted, on behalf of the West Side Company, the formal objections to the passage of Senate Bill No. 94 set out in Government's Exhibit No. 108. It will be noted that on March 10, 1869, Senator Williams asked and by unanimous consent obtained leave to introduce Senate Bill No. 94, and the same was read twice, and referred to the Committee on Public Lands, of which he was a member. That bill contained no proviso such as is found in the Act of April 10, 1869. In the Senate, on March 22, 1869, Mr. Williams made the report to accompany Senate Bill No. 94, which was the report from the Committee on Public Lands, to whom the bill had been referred.

We further quote from this report, (Vol. X, p. 5315 Transcript of Record) as follows:

“The West Side Company filed its assent within the required time; and if it was desig-

nated according to the Act of Congress, there seems to be no necessity for any further legislation upon the subject."

Secretary Browning, in his letter of January 20, 1869, was of the opinion that so far as the portion of road in Oregon was concerned, the grant had lapsed, while the grant for that portion of the road in California, was still in force, and that some legislation by Congress was necessary to revive the grant for the Oregon portion of the road. Secretary Browning, referring to the proposed measure, says: "The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose." It was under these circumstances that the Senate, influenced by the opinion of Secretary Browning, passed Senate Bill No. 94, in the form in which it was reported by the Committee on Public Lands of the Senate. The proviso found in the Act of April 10, 1869, was added in the House. The court in construing the Act as passed, necessarily must consider the primary purpose for which any legislation was deemed advisable or necessary. If the Secretary of the Interior, as a matter of law, was mistaken as to the need of further legislation, there would seem to be no question but that the West Side Company, by filing its assent within the required time, if it was designated according to the Act of Congress, had a vested right in the grant, which could not be impaired, and if, as a matter of law, the East Side Company was legally designated by the legislature of the State of Oregon, on October 20, 1868, and

Congress did not void the grant for failure to file assent within the time, or for any other reason, then that company had a vested right which could not be impaired by the Act of April 10, 1869.

On June 27, 1872, Joseph S. Wilson former Commissioner of the General Land Office, and then President of the European and Oregon Land Company, wrote a letter to Attorney General Williams, formerly United States Senator from Oregon, calling the attention of the Attorney General to the Act of July 25, 1866, and the amendatory act of April 10, 1869, and enclosed with this letter the opinion of S. M. Wilson, of date November 11, 1871, addressed to Jos. S. Wilson, as President of the European and Oregon Land Company, copy of which was therewith enclosed. (Government's Exhibit No. 109, Vol. X, pp. 5322-5363 Transcript of Record) There was also enclosed therewith Document A, which was a certified copy of the deed to be executed by Milton S. Latham, Faxon D. Atherton, and William Norris, Trustees, to the European and Oregon Land Company, to be joined in by the Oregon and California Railroad Company, purporting to convey to the European and Oregon Land Company the lands granted under the Act of Congress of July 25, 1866, subject to the terms and provisions of that certain trust deed executed by the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton, and William Norris, as Trustees, recorded at pages 727 to 734 both in-



clusive, of Book K, of the Records of Deeds of Multnomah County, Oregon, which trust deed was of date April 15, 1870. This proposed conveyance was authorized by the Board of Trustees of the European and Oregon Land Company on March 27, 1871, and Document A, which accompanied the letter of Mr. Wilson to Attorney General Williams, is a copy of the minutes of the European and Oregon Land Company, conveying full notice to the Department of Justice of the status of the grant, and of the contention of the European and Oregon Land Company as to the proviso in the Act of April 10, 1869, known as the "actual settler" clause. These documents were transmitted by Mr. Wilson, in his letter of June 27, 1872, to Ben Holladay, and in that letter Mr. Wilson says:

"The Company have adopted the opinion (transcript herewith)—which has been given by the Counsel:—regarding the principles therein enunciated as just and proper, and as realizing the purposes of the Grant. In order, however, that there may be a full understanding with the Executive Department of the Government, so that proceedings in disposal of the lands, may in all respects be harmonious and concurrent, it is requested that you will bring the matter to the attention of Attorney General Williams, who is thoroughly conversant with the subject; to the end that he may request the Secretary of the Interior, to dispatch an affirmation of the principles referred to, which the company would be gratified to have in the

form suggested, by the draft of a letter, which I enclose herein, addressed to myself."

This draft of affirmatory letter requested is set out in Vol. X, page 5346 Transcript of Record, as a part of Government's Exhibit No. 109, and the Secretary of the Interior was asked to advise as follows:

"The Department has considered the papers you referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239)—and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47)—and is satisfied that the construction given by the said Company is just and proper, to the effect that all actual settlers on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869—and all others who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding One hundred sixty acres, at Two Dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of 25th July, 1866, is in full force and effect, and authorizes the Company to sell on such terms as may be reasonable and just to all parties without any restriction."

Attorney General Williams, on April 20, 1872, transmitted these papers to the Commissioner of the General Land Office, who, under date of June 14, 1872, advised the Attorney General that the papers were submitted to the Secretary of the Interior, as advised in the letter of the Commissioner of date April 20, 1872, to the Attorney General, and the Commissioner enclosed with his letter of June 14th, a copy of the opinion of the Secretary of the Interior, of date June 5, 1872. Secretary Delano, in his short opinion of date June 5, 1872, stated that he was of the opinion that

“the proviso means just what it says. ‘That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.’ The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in larger quantities to other than actual settlers; and to limit the proviso’s operation to those on the lands granted at or before the survey of the road would, in my judgment, utterly defeat such intention.”

The letter of Mr. S. M. Wilson accompanying this correspondence, justifies the affirmatory letter requested of the Secretary of the Interior.

Government’s Exhibit No. 109-D, is a certified copy of the letter of Commissioner Drummond of date July 16, 1872, addressed to Attorney General



Williams, in his official capacity, (Vol. X, pp. 5370-5373 Transcript of Record) in reply to a letter of June 27, 1872, written by Attorney General Williams to the Commissioner. This letter is not in the record, and the testimony of the witness S. S. Marr was to the effect that diligent search had been made for this letter of the Attorney General, but it could not be found in the files of the Commissioner of the General Land Office, the Secretary of the Interior, or in the records of either office. The contents of that letter can, however, be inferred from statement made by Mr. Drummond, wherein he says:

“It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask that the papers may be filed until some question arises, or the parties bring them before me for consideration, or ask for opinion upon the question which they present, and that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject. \* \* \* It was not understood that you desired the opinion,

but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company. Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application, to reopen the case and to have all arguments the Company may desire to present upon the matter."

This evidence disclosed by Government's Exhibits Nos. 109-A, 109-B, 109-C, and 109D, (Vol. X, pp. 5322-5373 Transcript of Record) should be read in connection with Defendants' Exhibit 373, (Vol. XIV, pp. 7371-7375 Transcript of Record) which submits the exhibits offered and admitted in evidence on behalf of the Government, just referred to, all as showing full knowledge upon the part of the United States of the contention of the Oregon and California Railroad Company, as made through the European and Oregon Land Company, as to the proper construction of the Act of April 10, 1869, and as to the definite purpose of the Act, in the administration of the grant, and also as showing the form of deed to be executed by the European and Oregon Land Company, joined in by the Trustees, with notice of the trust deed of April 15, 1870, which purchasers would be expected to receive; and also showing, as early as January 23, 1874, that the grant was being administered by the Oregon and California Railroad Company in the

way and manner indicated; and as tending to show that the United States, with full notice of the proposed action of the company, took no steps to enforce the so-called "actual settler" clause, from the date of this correspondence, in 1872, up to the passage of the Joint Resolution by Congress, of date April 30, 1908, a period of about thirty-six years.

The record shows, (Government's Exhibit No. 110, Vol. X, pp. 5374-5452 Transcript of Record) that the Oregon and California Railroad Company filed its Selection Lists beginning July 28, 1870, and ending February 9, 1903, and that these lists, numbered 1 to 161 both inclusive, include lands patented to the company under the Acts of July 25, 1866, and May 4, 1870; that the date of approval of these lists by the Secretary of the Interior ranges from November 23, 1870, up to November 28, 1906, and that patents issued beginning May 9, 1871, up to December 7, 1906, covering a period of approval of Selection Lists by the Secretary of the Interior, and formal issuance of patents, from November 23, 1870, up to December 7, 1906, a period of thirty-six years, and that all of the Selection Lists were approved, and all patents were issued, after the correspondence shown by Government's Exhibit No. 109, and after June 5, 1872, the date of the letter of Secretary Delano declining to concur in the construction placed upon the proviso of the Act of April 10, 1869, by the Oregon and California Railroad Company, and the



European and Oregon Land Company, and their counsel, excepting four Selection Lists approved, respectively, November 23, 1870, June 26, 1871, May 9, 1872, and three patents, issued, respectively, May 9, 1871, July 12, 1871, and May 29, 1872, and covering, in the aggregate, 229,996.76 acres. All succeeding Selection Lists were approved, and all succeeding patents were issued, after June 22, 1876, and prior to the construction of the road south of Roseburg. The road was constructed to Roseburg in 1872, a distance of about 198 miles (Vol. IV. pp. 1588, and 1717-1720 Transcript of Record.)

Government's Exhibit No. 111, (Vol. X, pp. 5406-5409 Transcript of Record) shows that the application made by the Oregon and California Railroad Company under date of July 12, 1870, accompanying the Selection Lists, refers specifically to the Act of July 25, 1866, and the Amending Acts of July 25, 1868, and April 10, 1869, and that the company asked to have the Selection Lists approved, and the same passed to patent, as earned under these Acts of Congress, on account of construction of particular sections of road, and that these applications were supported by the affidavit of the Land Agent of the company, to the effect that the list was a correct one of a portion of the lands claimed by the company under the Act of Congress mentioned. There-with was a certificate of the Register and Receiver of the local Land Office, to the effect that they had

examined the list, attested the accuracy of the same by the plats and records of the local Land Office, and that the list was found to be correct; that the filing thereof was allowed and approved, and that the whole of the lands were surveyed, public lands, within the limits of the grant, as required thereby, and that the lands were of the class contemplated by the Act, and that the fees required by the Act of Congress approved July 1, 1864, and the Circular of Instructions from the Commissioner of the General Land Office, to the amount stated, had been paid. This form was substantially followed from that date, at all times, as shown by Government's Exhibits Nos. 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, and 111-G (Vol. X, pp. 5405-5452 Transcript of Record). The date of the last Selection List is August 29, 1895, certified by the local United States Land Office, September 3, 1895, thirteen years prior to the filing of the bill of complaint in this cause, on September 4, 1908.

Government's Exhibit No. 112, (Vol. 11, p. 5477) consisting of "Letter-head, form 3311," apparently issued by

Southern Pacific Company,  
Land Department."

showing thereon, and as covered thereby, the constituent companies

- (a) Southern Pacific Land Co.
- (b) Southern Pacific Railroad Co.
- (c) Central Pacific Railway Co.
- (d) Oregon & California Railroad Co.
- (e) Oregon & California Land Co.

with B. A. McAllaster, Land Commissioner, and F. W. Houtz, Assistant Land Commissioner, indicating that at the time this letter-head form was adopted, there was a Southern Pacific Company Land Department, as the Government claims, to operate the lands of the five subsidiary companies mentioned, including that of the Oregon and California Railroad Company. This, if true, is wholly immaterial to any issue involved in this case.

Government's Exhibit 113, (Vol. XI, p. 5493) consists of letters from real estate agents and others, commencing with date May 13, 1905, and ending with date September 15, 1905, addressed to Acting Land Agent Charles W. Eberlein, with his replies thereto, each of which letters from these various real estate agents is designated by Government's counsel as an "application to purchase" but which really are usual letters from real estate agents, promoters, immigration bureaus, and the like, who were seeking business. One of these so-called applications to purchase is from Chicago, Illinois, of date February 20, 1905, (p. 5483) and says "we kindly ask you to let us know at once what sort of homes, lots, farms, timber and mineral lands on your list;" also "we ask big land syndicates, associations and R. R. corporations, owners of lands, timber and minerals, to furnish our representatives accompanying homeseekers excursion with free round-trip tickets. These so-called applications to purchase are as follows:



(1) From Vernon, Texas, from J. E. Lutz, Real Estate, Abstracts, and Fire Insurance, H. & T. C. R. R. Co. Land Agent. Farming and Ranch Lands a Specialty.

(2) From Muscatine, Iowa. H. M. Bartlett, Attorney at Law.

(3) From Chicago, Ill. J. Lucos, Manager, Immigrant's Information Bureau.

(4) From Duluth, Minn. Finnish American Land Co.

(5) From Mt. Pleasant, Michigan. Hoban & Taggart, Oregon State Managers, Field Department, The Gold Reserve Life Association, Mt. Pleasant, Michigan, advertising that they deal in farms, fruit land, wheat land, hop land, irrigated land, acre homes, timber lands, etc. Therewith there was enclosed their card showing a Portland office, Room 4, 109 $\frac{1}{2}$  6th St., near Washington, advertising themselves as agents for "farm land" and "timber lands." (p. 5488)

(6) From Rock Falls, Ill. R. L. Leitch; seeking information with a view of bringing out a part of land seekers and inquiring as to terms to agents and rates of transportation.

(7) From Portland, Oregon, W. T. Smith; claiming to have been sent to Portland representing fifty families or more, who wish to come West from Oklahoma to Oregon, and who had in their minds when they left home, government land.

Government's Exhibit 114, (Vol. XI, pp. 5493, 5502) is correspondence between W. H. Mills, Land Agent, George H. Andrews, Acting Land Agent, Charles W. Eberlein, W. D. Cornish, and Wm. F. Herrin, relating to a new item appearing in a Marshfield, Oregon, paper, with reference to an alleged discovery by a local law firm of a defect in the title to the lands of the Southern Oregon Company, which had caused the filing of 200 applications for quarter sections "on that tract, which is one of the most valuable pieces of timber lands in the Northwest. It is claimed that this immensely valuable tract of timber is held in trust by the Southern Oregon Company for the people, the clause in the original grant to the State of Oregon from the Federal Government being operative, in which it recites that the land shall not be sold to individuals other than citizens of the United States, and in tracts not larger than 160 acres and at a price not to exceed \$2.50 \* \* \* Intense excitement prevails as a result of the disclosures regarding the title. This company has persistently refused to sell a foot of land to settlers at any price. The applicants have subscribed \$3000 for the purpose of fighting the suit which is to be instituted by the Southern Oregon Company."

A suit is now pending in the District Court of the United States for the District of Oregon, brought by the United States against the Southern Oregon Company to forfeit the lands owned

by that company, and is prosecuted under the authority of the Joint Resolution of Congress passed April 30, 1908, (35 Stat.571). This newspaper clipping, as a part of this Exhibit 114, introduced in evidence by the Government, is fairly illustrative of the motive which caused the "intense excitement" resulting in the filing of "200 applications for quarter sections on that tract, which is one of the most valuable pieces of timber lands in the Northwest." The suit to forfeit the grant is presumably grounded upon the claim that "this immensely valuable tract of timber is held in trust by the Southern Oregon Company for the people," and is analogous to the suit now on appeal in its purpose and effect, and is in part illustrated by the action of the United States in the 45 suits brought against the so-called "innocent purchasers" and settled under the Act of August 20, 1912, whereby approximately<sup>340,000</sup> acres of timber lands sold in alleged violation of the actual settler clause, have been patented to the purchasers as timber lands, at the rate of \$2.50 per acre.

Government's Exhibit 115, (Vol. XI, pp. 5502, 5509, Transcript of Record) is the correspondence between Acting Land Agent Charles W. Eberlein, and D. A. Chambers, and Land Commissioner B. A. McAllaster and Mr. P. F. Dunne, between August 11, 1905, and August 16, 1905, relating to the practice in the Land Department of the United States as to transfer of grants made by



Congress for railroad purposes, and to the effect that land grants may be transferred by filing evidence thereof in the General Land Office satisfactory to the Land Department, and that no act of Congress is required or necessary therefor.

Government's Exhibit 116, (Vol. XI, pp. 5509, 5523, Transcript of Record) purports to be a copy of written statement of August 23, 1907, prepared by Government's counsel from information given to him by David Loring, who was called, and testified as a witness on behalf of the defendants, (Vol. V, pp. 2187, 2228, Transcript of Record) and which was offered in evidence by the Government for the purpose of impeaching the testimony of Mr. Loring. Defendants moved to strike out this exhibit as incompetent, irrelevant and immaterial, and as hearsay, and as shown to be a narrative of a past transaction, and a good deal of such narrative hearsay.

Government's Exhibit 117, (Vol. XI, p. 5523, Transcript of Record) is a copy of an affidavit of Irvine P. Gardner, offered in evidence by the Government (Vol. VI, pp. 3025, 3058, Transcript of Record) for the purpose of impeaching Mr. Gardner, who testified as a witness on behalf of the defendants, (p. 3050, *supra*.) This exhibit was received over the objection of the defendants that the same was incompetent, irrelevant and immaterial, and upon the further ground that the defi-

nitions of grazing and agricultural were given to the witness by the special inspector, Mr. Underwood, and that the answer given shows that it was the answer of the special inspector and not that of the witness.

Government's Exhibit 118, (Vol. XI, p. 5525, Transcript of Record) is a portion of newspaper "Coos Bay Times," printed and published at Marshfield, Oregon, containing purported photographs of lands, industries, etc., of Coos County, Oregon.

Government's Exhibit 119, (Vol. XI, pp. 5525, 5526, Transcript of Record) purports to be a copy of an affidavit made by W. B. Fuller, a witness who testified on behalf of defendants, (Vol. VI, pp. 3127, 3138, Transcript of Record) and which exhibit was offered by the Government for the purpose of impeaching the witness, which was received over the objection of the defendants that the same was not impeaching evidence, was incompetent, irrelevant and immaterial, and was prepared by the Government, written out by Mr. Foley, as a special agent of the General Land Office, in his own language, detailing some conversation which the special agent may have had with the witness. (p. 3133 supra.)

Government's Exhibit 120, (Vol. XI, pp. 5526, 5528, Transcript of Record) purports to be a copy of an affidavit made by W. T. Grieve, County Assessor of Jackson County, Oregon. The Govern-

ment offered, and the same was received, in evidence for the purpose of impeaching W. T. Grieve, who testified as a witness on behalf of the defendants, (Vol. VI, pp. 3199, 3228, Transcript of Record.)

Government's Exhibit 121, (Vol. XI, p. 5529, Transcript of Record) is a booklet purporting to have been issued under the co-operative plan of the Southern Pacific Lines in Oregon, William McMurray, General Passenger Agent, and to have been planned and executed by the Sunset Magazine, Homeseekers' Bureau, Portland, Oregon, and purports to describe the agricultural and other resources of Lincoln County, Oregon, especially tributary to Toledo, in that county.

Government's Exhibit 122, (Vol. XI, p. 5529, Transcript of Record) is a purported statement made by F. A. Elliott to B. D. Townsend prior to the institution of this suit, and was offered in evidence by Government's counsel for the purpose of impeaching the testimony of Mr. Elliott, who testified as a witness on behalf of the defendants, (vol. VI, pp. 2714, 2787, Transcript of Record.) This exhibit was received over the objection of defendants that the same was narrative or purported narrative, based upon an alleged conversation between the witness and Mr. Townsend, Government's counsel, and contains admitted or purported conclusions of Mr. Townsend from the conversa-



tion with the witness, and is hearsay, and not impeaching testimony, and is an unsigned document, not a statement of the witness but the statement of counsel based upon his understanding of what witness may have said.

Government's Exhibit 123, (Vol. XI, p. 5529, Transcript of Record) is a purported copy of an affidavit of H. S. Maloney, executed before Harry E. Laughlin, special agent of the General Land Office, February 29, 1912, (Vol. VIII, pp. 4037, 4053, Transcript of Record) and was offered in evidence by the Government "for the purpose of showing that the Government has been taken by surprise with the testimony of this witness, as reliance was made by the Government upon this statement made over the signature of Mr. Maloney, and has called him as a witness basing it upon that statement." (p. 4047). Mr. Maloney testified as a witness on behalf of the Government and the exhibit was received over the objection of the defendants that the same was an attempt by the Government to impeach its own witness and to place in the record "a statement made by this witness at the instance of the Government's inspector upon a conversation that may have been loosely had in his office and written out by the Government's inspector for the purpose of this case."

Government's Exhibit 124, (Vol. XI, pp. 5529-5530, Transcript of Record) is a photograph purporting to show improvements of E. J. Mahan, a

witness for complainant, on Section 17, Township 39 South, Range 1 East, Jackson County, Oregon. E. J. Mahan, testified as a witness on behalf of complainant, (Vol. VIII, pp. 4132, 4152, Transcript of Record). This exhibit is printed in Volume XVIII, Transcript of Record.

Government's Exhibit 125, (Vol. XI, p. 5530, Transcript of Record) is a booklet purported to have been issued under the co-operative plan of the Southern Pacific Lines in Oregon, and to have been planned and executed by the Sunset Magazine, Homeseekers' Bureau, Portland, Oregon, and purports to describe agricultural and other industries in Grants Pass, Josephine County, and the Rogue River Valley, all in Oregon.

Government's Exhibit 126-a (Vol. XI, pp. 5530, 5548, Transcript of Record) is a copy of "Deed of Trust of Congressional Land Grant from the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and Wm. Norris," bearing date April 15, 1870. This trust deed is signed by the Oregon and California Railroad Company and was recorded April 18, 1870, in Records of Deeds for Multnomah County, Oregon. It purports to convey the whole of the lands and franchises granted or intended to be granted by the Act of July 26, 1866, and acts supplemental thereto and amendatory thereof, for the purpose of securing the holders of 18,450 bonds of the com-

pany of the par value of \$10,950,000.00. This trust deed recites the conveyance made March 29, 1870, by the Oregon Central Railroad Company (East Side) to the Oregon and California Railroad Company of all the property of the former company, including the lands granted by the Act of July 25, 1866, and acts amendatory thereof and supplemental thereto.

Government's Exhibit 126-b, (Vol. XI, pp. 5548, 5573) is a copy of "Railroad Mortgages or Deed of Trust, Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton," bearing date July 15, 1871, recorded October 14, 1871, in Records of Mortgages for Multnomah County, Oregon, and purports to secure 5860 bonds of the par value of \$4,395,000.00, and to convey, as security therefor, the railroad of the West Side Company and the lands granted by the Act of May 4, 1870. This instrument was executed by the Oregon Central Railroad Company and also by Milton S. Latham and F. D. Atherton, Trustees.

Government's Exhibit 126-c, (Vol. XI, pp. 5573, 5602, Transcript of Record) is a "Second Mortgage to secure \$300,000, Oregon Central Railroad Company to W. D. Shipman and S. L. M. Barlow," March 1, 1876, West Side, and recites the execution of the deed of trust or mortgage of July 15, 1871, executed by that company to Milton S. Latham and Faxon D. Atherton, to secure bonds



amounting to \$4,300,000.00, and that said mortgage or deed of trust is duly recorded in the Records of Mortgages for Multnomah, Washington and Yamhill Counties, in the State of Oregon, all of which bonds were pledged to Milton S. Latham of San Francisco, California, in trust for certain creditors of the company as security for a loan of \$1,000,000.00, gold, and accrued interest, which mortgage to W. D. Shipman and S. L. M. Barlow purports to convey the railroad of the company, then or to be thereafter constructed, together with the lands granted by the Act of May 4, 1870, and purports to convey the same *in solido* and without reference to the actual settler clause, so-called, of Section 4 of that act. It is recited also that this mortgage or trust deed was recorded October 14, 1876, in the Records of Mortgages for Multnomah County, Oregon.

Government's Exhibit 126-d, (Vol. XI, pp. 5603, 5618, Transcript of Record) is a copy of the contract between Ben Holladay and the Frankfort Committee, of date February 29, 1876, by the terms of which Holladay sold and transferred, and agreed to sell and transfer to the Frankfort Committee \$19,000,000.00 of the stock of the Oregon and California Railroad Company, all then lawfully issued excepting \$1,000,000.00 held by Milton S. Latham, and a majority of the stock of the Oregon Central Railroad Company (West Side) that is—over 75,000 shares thereof, the remainder be-

ing held by Milton S. Latham and others, and by which Holladay in like manner sold and transferred, and agreed to sell and transfer to the Frankfort Committee, all of the stock of the Oregon Steamship Company and Portland Warehouse & Dock Company, to the Frankfort Committee for certain consideration therein stated, and upon the performance of certain covenants and conditions by Holladay, the Frankfort Committee agreed to pay him \$200,000.00 in gold coin, less certain sums, and in one year the further sum of \$50,000.00 and by which Holladay was to receive, also, bonds of the par value of \$300,000.00 to be issued by the West Side Company and secured as therein stated.

Government's Exhibit 126-e, (Vol. XI, pp. 5619, 5623, Transcript of Record) is a "Modification of Agreement between Holladay and the Frankfort Committee," made April 19, 1876. It is therein recited that the Frankfort Committee owned or held, and represented, of the First Mortgage Bonds of the Oregon and California Railroad Company, approximately ten millions of dollars.

Government's Exhibit 126-f, (Vol. XI, pp. 5623, 5639, Transcript of Record) is the "Definite Agreement between the Frankfort Committee, the European Creditors and the Three Companies," meaning thereby the Oregon Steamship Company, the Oregon and California Railroad Company and the Oregon Central Railroad Company, and is dated about August 20, 1877. This agreement recites

the financial condition of the three companies, the compromise agreement of February 29, 1876, with Ben Holladay, and provides that upon its execution, the agreement of April 6, 1876, and May 26, 1876, shall be cancelled and be deemed to be superseded by a preliminary agreement of September 6, 1876, and by which the parties were to make certain payments and to do certain things in liquidation of the indebtedness of the companies and in repayment of the same.

Government's Exhibit 126-g, (Vol. XI, pp. 5639, 5669, Transcript of Record) is a copy of the "General Contract between the Oregon and California Railroad Company and the Bondholders for Funding Interest," and bears date July 25, 1874, and recites the financial condition of the companies involved, and that the Frankfort Committee was the owner and holder of 11,147 bonds of the Oregon and California Railroad Company of the par value of \$6,468,600.00 secured by the first mortgage executed to Faxon D. Atherton and Milton S. Latham, Trustees; and further recites that the Oregon and California Railroad Company was unable to pay the coupons due October 1, 1873, and April 1, 1874, on its debt of \$10,950,000.00 issued and secured by said first mortgage, the interest thereon running at the rate of seven per cent per annum. The agreement gave to the bondholders power to control the affairs of the Oregon and California Railroad Company upon the terms stated, and to con-



trol its operation, receipts and disbursements. It recites the existence of the deed of trust relating to the land grant of the company, executed to Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, April 15, 1870, by the European and Oregon Land Company, and recites other details looking towards the protection of the bondholders in the administration of the land grant and the operation of the railroad.

In Government's Exhibit No. 126-G, (Vol. XI, pp. 5669, 5768) is included an "Agreement as to appointment of Financial Agent," between the bondholders and the company, by which Richard Koehler was to be appointed Financial Agent with plenary power, as such, in respect to the operation of the properties of the company and the control of its funds. In addition to being the Financial Agent of the company, he was to be its Auditor.

Government's Exhibit No. 126-G, also includes, (Vol. XI, pp. 5679-5688, Transcript of Record) copy of "Contract between Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, Ben Holladay, the Oregon and California Railroad Company, and the bondholders, as to the management of the land grant. This contract bears date July 25, 1874, and was executed by the parties mentioned. It recites the indebtedness of the Oregon and California Railroad Company in the sum of \$10,950,000.00, secured by First Mortgage Bonds upon all of the property of the company except

its land grant of date April 15, 1870, and a deed of the same date executed by the company, conveying its land grant to Milton S. Latham, Faxon D. Atherton and Wm. Norris, as Trustees, for the purpose of establishing a sinking fund for the redemption of these bonds, and recites that these two instruments were each referred to in the other and were a part of one and the same transaction. It further recites that the sinking fund trustees had sold and conveyed the land grant and certain rights and interest in the land and property included in the land grant, to the European and Oregon Land Company, by deed of date March 28, 1871, on certain conditions therein stated. It further recited that the company failed to pay its interest upon these bonds, falling due in October, 1873, and in April, 1874, and would probably be unable to pay any interest thereon for a considerable time to come, and that the property of the company named in the mortgage was then subject to sale under foreclosure. It further recited that a majority in interest and number of the holders of these mortgage bonds proposed to foreclose this mortgage forthwith, and to endeavor by all suitable means to obtain a reconveyance of the rights and property sold to the European and Oregon Land Company. It further recited that there has been an agreement for the settlement of all disputes between the railroad company and its bondholders, which was referred to and made a part of this contract, the terms of which are set

out. It also recited that the European and Oregon Land Company had spent certain sums of money, "caused plans, written descriptions and maps of said land named in said land grant to be made and circulated, and in advertising the said land and in maintaining agencies for the sale thereof, and in other ways which will be of great benefit to all parties interested in the sale thereof." The agreement recited that the European and Oregon Land Company had reconveyed the property to the trustees and that the proceeds of the sale of the lands thus reconveyed, should be invested in a trust fund, as provided by the trust deed; that this trust fund might be invested in the purchase of these First Mortgage Bonds at any time, on the terms stated, and that "all the business relating to the selling and due advertising of said lands, or other property, the maintaining and establishing of agencies and appointment of agent, and the entire management thereof, shall be carried on under the direction of said parties of the second part," (known as the Frankfort Committee) "as a part of the business of the Oregon and California Railroad Company, and through a bureau to be known as the Land Department of said company."

Government's Exhibit No. 126-G, also contains therein a copy of an "Agreement between the European and Oregon Land Company and Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, and others," (Vol. XI, pp. 5688-5705, Trans-



cript of Record) of date July 25, 1874. The Frankfort Committee was party of the third part; the Oregon and California Railroad Company party of the fourth part, and Ben Holladay, who was then the owner of a majority of the capital stock of the Oregon and California Railroad Company, was party of the fifth part. It recites the execution of the mortgage of April 15, 1870, to Milton S. Latham and Faxon D. Atherton to secure the payment of certain bonds, and the record of this mortgage in the Records of Mortgages for Multnomah County, Oregon, and that on April 15, 1870, the Oregon and California Railroad Company, for the purpose of creating a sinking fund for the payment of these bonds, conveyed, by deed of that date, to the trustees named, the lands granted by the Act of July 25, 1866, and acts supplemental thereto and amendatory thereof; and recited the record of that deed in the Records of Deeds for Multnomah County, Oregon. It further recited that on March 28, 1871, the trustees executed a deed to the European and Oregon Land Company, which contained certain terms and conditions as to sale and conveyance of the property, and which covered the lands granted aforesaid, and that this deed was likewise recorded in the Records of Deeds for Multnomah County, Oregon. It further recited that "comparatively but a small portion of said lands have been sold by said parties of the first part (meaning the European and Oregon Land Company) and that the Frankfort Commit-

tee were the owners and possessors of a majority of the bonds secured," as stated. The agreement further recited that it was to the best interest of the Frankfort Committee, representing the bondholders, that the sale to the European and Oregon Land Company should be cancelled and the land reconveyed upon the terms stated in the agreement; and it further recited that the European and Oregon Land Company "has spent large sums of money in causing plans, written descriptions and maps of the land in said land grant to be made and circulated, and in advertising said lands, and in maintaining agencies for the sale thereof, and in other ways which would be of great benefit to all parties interested in the sale thereof." The agreement further recited that all parties thereto were interested in adjusting the matters, in securing to the bondholders the fullest security "to be obtained from said lands so conveyed in trust to" the trustees. The agreement amounted to a rescission of the contract of sale and conveyance to the European and Oregon Land Company upon the terms stated, and a conveyance by the European and Oregon Land Company to the trustees of all the lands and franchises granted or intended to be granted to the Oregon and California Railroad Company by the Act of July 25, 1866, and acts supplemental thereto and amendatory thereof, with the exception of certain sales or executory contracts for sales made by the European and Oregon Land Company under the deed of March 28, 1871, a par-

ticular description of which excepted premises belonging to the land grant are set out in the agreement. These descriptions show tracts sold or contracted to be sold by the European and Oregon Land Company, presumably to a single purchaser, in excess of 160 acres. The other parcels cover small tracts ranging from 5.69 acres up to 160 acres to single purchasers.

There is also included in Government's Exhibit No. 126-G, copy of "Contract as to the Oregon Steamship Company (Vol. XI, pp. 5706-5715, Transcript of Record) and copy of "Contract as to Oregon Central Railroad Company," (Vol. XI, pp. 5715-5724). The first mentioned contract is between the Oregon Steamship Company, the Oregon and California Railroad Company, the Frankfort Committee and Milton S. Latham, trustee, for the creditors of the Oregon Steamship Company, and provides for the liquidation of the indebtedness of the Oregon Steamship Company, and the payment of interest upon the bonds issued and unredeemed by the Oregon and California Railroad Company, and interest upon the indebtedness of the Oregon Central Railroad Company. The last mentioned contract recites a default of the Oregon and California Railroad Company in payment of interest upon its First Mortgage Bonds; the agreements with Holladay and the Frankfort Committee and other agreements; the default of the Oregon Central Railroad Company in payment of its in-



terest upon its First Mortgage Bonds of \$4,395,-000.00 outstanding and held as collateral to secure an indebtedness of \$1,000,000.00, and otherwise provides for the settlement of all matters between the parties upon the terms therein stated.

Government's Exhibit No. 126-H, (Vol. XI, pp. 5725-5734) is a copy of "Agreement as to disposition of earnings of Oregon Steamship Company and Oregon Central Railroad Company, referred to in contract just mentioned.

Government's Exhibit No. 126-I, (Vol. XI, pp. 5734-5750) is a copy of "Original Conveyance of Oregon and California Land Grant to European and Oregon Land Company," of date March 28, 1871, executed by Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, and joined in by the Oregon and California Railroad Company. This deed recites the execution of the trust deed of April 15, 1870, executed by the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and Wm. Norris, by which that company conveyed to the trustees named the lands granted by the Act of July 25, 1866, and all acts supplemental thereto and amendatory thereof, and recites that this deed was recorded in the Records of Deeds for Multnomah County, Oregon, and thereupon purports to convey the lands so granted to the European and Oregon Land Company, subject to the terms and provisions of the

trust deed of April 15, 1870. By this sale the European and Oregon Land Company agreed to pay to the Oregon and California Railroad Company for this land at the rate of \$1.25 per acre, with interest at the rate of six per cent per annum upon the purchase price so computed. This conveyance, as well as the conveyance of April 15, 1870, was a conveyance of the land granted *in solido* for a valuable consideration, in each case, and, of course, without any regard to the so-called Actual Settler Clause in the proviso of April 10, 1869.

Government's Exhibit No. 127, (Vol. XI, pp. 5751-5756, Transcript of Record) is a copy of the agreement between the Central Pacific Railroad Company and the Oregon and California Railroad Company, as first parties, and the Pokegama Sugar Pine Lumber Co. as second party, for the sale of certain lands in California and Oregon described as "timber lands," consisting of 27,800 acres, of which 14,800 acres were in California and 13,000 acres were in Oregon, and sold at the rate of \$9.00 per acre for 8000 acres; \$5.00 per acre for 5000 acres of the lands in Oregon, and the lands in California at the rate of \$7.00 per acre, or a total sum of \$200,600.00 for the total 27,800 acres. That portion of the lands granted by the Act of July 25, 1866, situated in California, and described in this contract, would not be subject, if conveyed under the contract, to any alleged actual settler clause, while the lands in Oregon covered by the

contract would be subject to the proviso of the Act of April 10, 1869, although the grant in each instance was made by the same Act of Congress to aid in the construction of a continuous line from Roseville Junction, in California, to Portland, in Oregon.

Government's Exhibit No. 128, (Vol. XI, pp. 5757-5765, Transcript of Record) is a quitclaim deed executed by the Northern Pacific Railroad Company to the City of Portland, August 7, 1886, and purports to quitclaim to the City of Portland a strip of land fifty feet in width for a water pipe line across certain odd sections of land in Township 1 South, Ranges 4, 5, and 6 East of the Willamette Meridian, and the Central Trust Company of New York joins in this deed. These were lands within the limits of what is called the Northern Pacific Overlap but within the indemnity limits of the grant of July 25, 1866.

Government's Exhibit No. 129, (Vol. XI, pp. 5765-5766, Transcript of Record) consists of the record of the minutes of all meetings of the directors and stockholders of the Oregon and California Railroad Company from date of the organization of that company until September 4, 1908, the date of the institution of this suit. By stipulation this exhibit was withdrawn upon the understanding that either party might designate any portion thereof to be included in the printed record,



and that verified copy of this exhibit should be substituted for the original, if requested, and considered a part of the record in this cause.

Government's Exhibit No. 130, (Vol. XI, p. 5766, Transcript of Record) consists of certified copies of certain letters between the Secretary of the Interior and the General Land Office and Senator George H. Williams, J. H. Mitchell, attorney for the East Side Company, I. R. Moores and George H. Cole, President and Secretary of the East Side Company, all printed in full, (Vol. IV, pp. 1910-1920, Transcript of Record) and which relate to a discussion of the rights of the Oregon Central Railroad Company (East Side) and the Oregon Central Railroad Company (West Side) under the action of the respective companies in reference to the grant made by the Act of Congress of July 25, 1866.

SUMMARY OF THE CASE MADE BY THE  
EVIDENCE UPON BEHALF OF THE ORE-  
GON AND CALIFORNIA RAILROAD COM-  
PANY, SOUTHERN PACIFIC COMPANY,  
AND STEPHEN T. GAGE, INDIVIDUALLY  
AND AS TRUSTEE. DEFENDANTS-APPEL-  
LANTS.

To assist the court in consideration of the case made by Defendants-Appellants, it is believed to be advisable to summarize the testimony upon the special subjects to be considered, as follows:

EARLY HISTORY OF THE OREGON CENTRAL  
RAILROAD COMPANY, WEST SIDE, OREGON  
CENTRAL RAILROAD COMPANY, EAST SIDE,  
AND OREGON AND CALIFORNIA RAILROAD  
COMPANY.

## I-II

The summary of "STIPULATION AS TO THE FACTS," pages 133 et seq. supra, need not be repeated. No summary of the evidence is required, under Points I and II of Points and authorities hereinafter set out in part II of this brief, pp.

## III

Under Point III of POINTS AND AUTHORITIES, hereinafter set out in this brief, pages 571-

610 the relation of the California and Oregon Railroad Company and the Oregon companies, is discussed, also the contention made that

Congress was without lawful authority on April 10, 1869, (16 Stat. 47) to annex a condition by amendment, or otherwise, to the land grant made by the Act of July 25, 1866, (14 Stat. 239) as amended by the Act of June 25, 1868, (15 Stat. 80).

The evidence to be considered in connection with what was done under these various statutes may be summarized as follows:

(a) Copy of Act of July 25, 1866. (Vol. I, pp. 6-13 Transcript of Record)

(b) Copy of amendatory Act of Congress of June 25, 1868. (Vol. I, pp. 13-14 Transcript of Record)

(c) Copy of amendatory Act of Congress of April 10, 1869. (Vol. I, pp. 20-21 Transcript of Record)

(d) Copy of Articles of Incorporation of the Oregon Central Railroad Company of Portland, (West Side). (Vol. IV, pp. 1625-1628 Transcript of Record)

(e) Copy of House Joint Resolution No. 13 of the Legislature of Oregon, adopted October 10, 1866. (Vol. I, pp. 15-16 Transcript of Record)

(f) Certified copy of resolution of the West Side Company assenting to the Act of Congress approved July 25, 1866, adopted May 25, 1867, certified copy of which was filed on July 6, 1867, with the Secretary of the Interior, together with a certified copy of its Articles of Incorporation, and House Joint Resolution No. 13, adopted October 10, 1866, and a correct copy of its map of survey of its projected line of road, filed in the Depart-



ment of the Interior August 20, 1868. (Vol. IV, pp. 1555 and 1629; Vol. IX, pp. 4286-4288 Transcript of Record)

(g) Copy of Articles of Incorporation of the Oregon Central Railroad Company of Salem, (East Side), filed in the office of the Secretary of State April 22, 1867. (Vol. IV, pp. 1555 and 1630-1632 Transcript of Record)

(h) Copy of Senate Joint Resolution No. 16, of the Legislature of Oregon, adopted October 20, 1868, rescinding House Joint Resolution No. 13, and designating the East Side Company the beneficiary of the Act of July 25, 1866. (Vol. IV, p. 1556; Vol. I, pp. 17-18 Transcript of Record)

(i) Adoption November 25, 1868, by East Side Company, of resolution accepting the grant of July 25, 1866, and directing that the Secretary of the East Side Company be instructed to prepare a true and certified copy of the preamble and resolution, together with a certified copy of such Joint Resolution known as Senate Joint Resolution No. 16, and forward same to the Secretary of the Interior, to be filed as the assent of the East Side Company to the grant aforesaid. (Vol. X, pp. 5026-5027 Transcript of Record)

(j) Copy of the resolution of the East Side Company, adopted June 8, 1869, filed June 30, 1869, with the Secretary of the Interior, assenting to the Act of July 25, 1866, and all acts amendatory thereof. (Vol. IV, p. 1557; Vol. I, pp. 21-23 Transcript of Record)

(k) Filing by East Side Company, on October 29, 1869, in the office of the Secretary of the

Interior, of a map of the survey and location of the first sixty miles of its projected line of railroad, extending Southerly from Portland; completion on or about December 24, 1869, by that company of the first twenty miles of its said line of railroad, commencing at Portland, and acceptance and approval thereof on December 31, 1869, by Commissioners appointed pursuant to Section 4 of the Act of July 25, 1866, who had theretofore examined the same. (Vol. IV, pp. 1557-1558 Transcript of Record)

(l) Copy of Articles of Incorporation of the Oregon and California Railroad Company, filed in the office of the Secretary of State, March 17, 1870. (Vol. IV, p. 1558; Vol. I, pp. 89-92 Transcript of Record.)

(m) Copy of deed of date March 29, 1870, executed by the East Side Company to the Oregon and California Railroad Company, recorded in the office of the County Recorder of the several counties in which was situate any part of the lands intended to be granted by the Act of July 25, 1866, (Vol. IV, p. 1558; Vol. I, pp. 93-125 Transcript of Record) by which deed the East Side Company conveyed to the defendant Oregon and California Railroad Company, its railroad and all its rights under the Act of July 25, 1866, and acts amendatory thereof, *in solido*.

(n) Copy of resolution of Board of Directors of Oregon and California Railroad Company adopted April 4, 1870, certified copy of which, with certified copy of deed of March 29, 1870, was filed in the office of the Secre-

tary of the Interior, on April 28, 1870. (Vol. IV, pp. 1558-1559; Vol. I, pp. 26-28 Transcript of Record)

(o) Copy of Act of May 4, 1870. (Vol. I, pp. 28-32 Transcript of Record)

(p) Adoption by the West Side Company on July 2, 1870, of a resolution in terms assenting to and accepting all of the provisions of the Act of May 4, 1870, and filing of same on July 20, 1870, in the office of the Secretary of the Interior. (Vol. IV, p. 1559; Vol. IX, pp. 4414-4415 Transcript of Record. Government's Exhibit No. 100-A)

(q) An Act of the Legislature of the State of Oregon of October 14, 1862, entitled, "An Act providing for private incorporations, and the appropriation of private property therefor," approved October 14, 1862, (Code of 1862, pp. 3-15 both inclusive) the material part of which act is now Lord's Oregon Laws, Sections 6679-6699-6838-46, 6653. In connection with this statute, should be considered the incorporation of the Oregon Central Railroad Company of Portland, (West Side Company), the incorporation of the Oregon Central Railroad Company of Salem, (East Side Company), and the Oregon and California Railroad Company.

(r) Adoption of resolution of the Board of Directors of the East Side Company, April 29, 1868, accepting the grant of July 25, 1866, empowering A. M. Loryea to present a duly certified copy thereof to the proper authorities, as provided by law, to be filed as certified by S. A. Clark, Secretary of the East Side Com-



pany, under date of April 30, 1868, (Vol. XIV, pp. 7454-5 Transcript of Record) and in connection therewith, adoption of resolution by the East Side Company, appointing A. M. Loryea, Agent and representative of that company, April 15, 1868; (Vol. X, pp. 4934-8 Transcript of Record) letter of A. M. Loryea of date July 16, 1868, addressed to O. H. Browning, Secretary of the Interior, enclosing same to Secretary of the Interior, so that it might be filed as an acceptance of the lands granted by Congress; (Vol. XIV, p. 7454 Transcript of Record) letter of O. H. Browning, Secretary of the Interior, to A. M. Loryea, of date July 17, 1868, (Vol. XIV, pp. 7440-1 Transcript of Record) acknowledging receipt of such certified copy of said resolution called "An Acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1866."

(s) Commencement of construction by West Side Company, April 15, 1868, (Vol. IV, p. 1760 Transcript of Record) and continuation of such construction up to and after April 10, 1869.

(t) Commencement of construction by East Side Company, April 16, 1868, (Vol. X, pp. 4939-4975 Transcript of Record)

(u) Letter of George H. Williams, Government's Exhibit No. 108, Objections to passage of Senate Bill No. 94, (Vol. X, pp. 5298-5321 Transcript of Record) and particularly the report of the Committee on Public Lands of the Senate, reporting said Act of April 10, 1869, in the form in which it passed the Senate, showing that it was the inten-

tion of Congress not to impair any vested rights arising out of the Act of July 25, 1866, which may have been created in favor of either of the Oregon companies, or of the California and Oregon Railroad Company, specifically named in the Act of July 25, 1866; and that the primary purpose of the Act of April 10, 1869, was to provide that one of the Oregon companies should obtain the grant, and that the grant might be used for railroad purposes, and that there might be a judicial settlement of the controversy between the two companies, not intending, however, to make the filing of assent obligatory, but permissive, and not intending to impair any right vested in the California and Oregon Railroad Company to construct a continuous line from Roseville Junction, in California, to Portland, in Oregon, under the Act of July 25, 1866, in the event no Oregon company was designated, or such company designated failed to construct the road and thereby earn the grant, in Oregon.

(v) Filing by the company of Selection Lists, approval of sale by the Secretary of the Interior, and issuance of patents to the lands described therein, in recognition of the fact that the East Side Company had constructed the road, and thereby earned the lands granted, as shown by Government's Exhibit No. 110, from July 8, 1870, down to and inclusive of December 7, 1906, (Vol. X, pp. 5374-5404 Transcript of Record) and Government's Exhibit No. 111, (Vol. X, pp. 5405-5452 Transcript of Record)

(w) Statement of maps of survey and location, filed in the Interior Department of the United States, by the East Side Company, and the Oregon and California Railroad Company, under the East Side grant, commencing with that filed October 29, 1869, and ending with the filing of the map of the twelfth section, August 18, 1884, Exhibit 13 to Stipulation, (Vol. IV, pp. 1713-1715 Transcript of Record) and statement of the dates of construction, completion, approval and acceptance of the several sections of East Side railroad, by the East Side Company, and the Oregon and California Railroad Company, Exhibit 14 to Stipulation, (Vol. IV, pp. 1717-1720 Transcript of Record), showing construction of first section of twenty miles completed December 24, 1869, examined by Commissioners and favorably reported upon December 31, 1869, reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendation approved by the President, January 29, 1870, and the twelfth section, extending to the boundary line between Oregon and California, completed prior to June 20, 1888, and report of the Commissioners transmitted by the Secretary of the Interior to the President, October 23, 1889, with recommendation that the railroad be accepted, and approval of such recommendation by the President, November 8, 1889.

(x) Exhibit "O" to the bill of complaint, (Vol. I, p. 527 Transcript of Record) show-



ing amount of land patented, compiled by years, separately stated as to East Side Grant, Act of July 25, 1866, as amended, beginning in 1871, down to and including 1906, showing patents issued for 2,765,597.13 acres, as earned by construction of road.

(y) Summary of patents issued to Oregon and California Railroad Company, as shown by Defendants' Exhibit 382, (Vol. XIV, pp. 7514-7557 Transcript of Record), a form of which patent is set out in Vol. IV, page 2045-6 Transcript of Record.

(z) Opinion of Assistant Attorney General Smith, to Secretary Delano, of date May 5, 1871; letter of Secretary Delano of May 8, 1871, to Attorney General Ackerman, and opinion of Attorney General Ackerman of date May 9, 1871, to Secretary Delano, as shown in Defendants' Exhibit 376, (Vol. XIV, pp. 7439-7474 Transcript of Record) advising that this grant could be transferred and sold *in solido* to the Oregon and California Railroad Company, and that the latter company was entitled to patents from the United States, therefor, for lands earned by construction of road, and showing that such construction was possible by reason of funds obtained from sale of bonds, secured by mortgage upon the property of the company, including this land grant, conveyed *in solido*, thereby placing construction upon the meaning and effect of the proviso of the Act of April 10, 1869, and by implication holding that such proviso did not create a condition subsequent, or did not affect the rights acquired under the Act of July 25,

1866, or the title granted to the company in fee simple, to aid in construction of road.

(aa) Correspondence between the European and Oregon Land Company and the Department of Justice, and the Department of the Interior, in 1872, showing construction of the proviso of April 10, 1869, as contended for by the European and Oregon Land Company, and notice imputed to the United States thereby, of the sale of this land grant *in solido* to the European and Oregon Land Company, and to Trustees, to secure bonds to be sold to procure funds for construction of road, and acquiescence of the United States, until April 30, 1908, in the construction of the grant as conveying the title in fee simple to the company, and as being in effect by the proviso of April 10, 1869, (Government's Exhibit No. 109, 109-A, 109-B, 109-C, and 109-D, Vol. X, pp. 5322-5374 Transcript of Record; Defendants' Exhibit 373, Vol. XIV, pp. 7371-7375; Defendants' Exhibit 374, Vol. XIV, pp. 7375-7383; Defendants' Exhibit 375, Vol. XIV, pp. 7383-7438 Transcript of Record) all relating to the administration of this grant under the Act of July 25, 1866, from December 19, 1870, down to November 9, 1905, in recognition of the right of the East Side Company, the Oregon and California Railroad Company, and the European and Oregon Land Company, their respective trustees and mortgagees, to convey the title in fee simple to the lands granted under the Act of July 25, 1866, without regard to the so-called "actual settler" clause in the proviso of the Act of April 10,

1869, thereby recognizing, for a period of thirty-five years, that that proviso in the Act of April 10, 1869, did not affect the title of the companies in any respect, and did not amount to a condition subsequent, for breach of which there could be forfeiture of the lands granted.

(bb) The facts stated in the argument under Point III of Points and Authorities, hereinafter set out in this brief, pages 571-610, show that the California and Oregon Railroad Company complied with the Act of July 25, 1866, and had the right, in default of the Oregon company, to continue construction of road from the Oregon and California state line, to Portland, Oregon, and earn the grant without regard to the Act of April 10, 1869.

#### IV.

Under point IV of Points and Authorities hereinafter set out in this brief, pages 610-653, the contention is made that the so-called "actual settler" clause in the act of April 10, 1869, and Section 4 of the act of May 4, 1870, construed so as to give effect to the primary policy of Congress and to carry out the purposes of the granting acts in the light of long-continued, contemporaneous, and permitted construction of these acts as evidenced by the record and subsequent legislation of Congress relating to land grants and public lands, did not create a *condition subsequent*. The evidentiary record in that respect, read in connec-



tion with the original act of July 25, 1866, the amendatory act of June 25, 1868, the amendatory act of April 10, 1869, and the act of May 4, 1870, may be summarized as follows:

(a) Presumed knowledge of Congress when it passed the act of June 25, 1868, of the actual work of construction by the West Side company begun April 15, 1868, (Vol. IV, page 1760), and the East Side company begun April 16, 1868, (Volume X, pages 4939-4975), and continued by both companies as rapidly, under the circumstances, as was reasonably possible.

(b) The report of the Committee on Public Lands of the Senate, of date March 22, 1869, accompanying Senate bill No. 94, introduced by Senator Williams March 10, 1869, (Volume X, pages 5310-5321) showing the reasons why the Senate Committee on Public Lands reported favorably upon the bill as it passed the Senate, and showing that the primary object and purpose of this legislation was to save the land grant for the benefit of the railroad company entitled to become the beneficiary thereof, in order that the grant might take effect "to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California to Portland in Oregon". The main object of Secretary Browning, as shown by his letter of January 13, 1869, made a part of this report, was to relieve him of embarrassment in declining to act upon maps filed by the West

Side company in the absence of a judicial decision as to the rights of the claimants or some action by Congress upon the subject, and also for the reason stated by him in his letter to Senator Williams, wherein he says:

“In reply, I have to say that as there are two companies of the same name claiming, under the laws of the State of Oregon, the benefit of the grant made by said act of 1866, I must decline, in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject, to comply with your request.”

The Senate Committee on Public Lands, commenting upon this correspondence referred to in its report, says:

“Looking at the above decision of the Secretary of the Interior, and the action of the Oregon Legislature in 1868, taken upon evidence submitted and arguments made by the respective companies, it is evident that the *State of Oregon* is in great danger, at least, of losing the grant altogether, without some legislation in effect reviving it.

Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and equities fully examined and adjudicated. \* \* \*

Both companies claim, and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by the sixth session of the act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the State has more interest than in the fortunes of either company."

(c) Correspondence between Secretary Browning, George H. Williams and others, Government's Exhibit No. 130, Volume XI, page 5766, Volume IV, pages 1910-1920, with reference to the rights of the East Side company and West Side company respectively, and the letter of Secretary Browning of date January 20, 1869, advising that on January 13, 1869, he had declined to act upon maps filed by the West Side company in the absence of a judicial decision as to the rights of the claimants or some action by Congress upon the subject.

(d) Correspondence between Joseph S. Wilson, President of European and Oregon Land Company, Ben Holladay, George H. Williams as Attorney General, C. Delano as Secretary of the Interior, and Willis Drummond as Commissioner of the General Land Office, relating to the construction of the act of April 10, 1869, Government's Exhibit No. 109, Volume X, page 5322, and therewith copy of deed executed by the Oregon and California Railroad Company and its trustees, to



the European and Oregon Land Company, by which the land granted under the act of July 25, 1866, and acts amendatory thereof, were conveyed in solido to the European and Oregon Land Company, to the knowledge of the Department of Justice and the Secretary of the Interior, and by which correspondence it is shown that the Oregon and California Railroad Company and European & Oregon Land Company contended that the proviso of the act of April 10, 1869, known as the "actual settler" clause, should be construed as contended by each company, in accordance with the opinion of their counsel, S. M. Wilson, copy of whose letter is in the correspondence; and that the proviso should be construed to the effect that "all actual settlers on the odd sections from 25th July, 1866, the date of the original grant, and all those who went on the odd sections from that date to the passage of the act of 10th April 1869, and all others who are found on such odd sections when the line of railroad is surveyed and established, are protected and have the right to purchase, each one, not exceeding 160 acres at \$2.50 per acre; but that in regard to all other persons, the original absolute grant by act of 25th July 1866 is in full force and effect, and authorizes the company to sell on such terms as may be reasonable and just to all parties, without any restriction." This evidence, brought to the attention of the Department of Justice and the Secretary of the Interior a distinct and definite breach of the alleged "actual settler" clause by the

conveyance mentioned and the contention made, and indicated a policy of the European and Oregon Land Company and the Oregon and California Railroad Company to insist upon the administration of the grant along these lines. The record shows that no action of any kind, other than a dissent to these views expressed by Secretary Browning, was ever taken by the United States and that it continually, from that date until April 30, 1908, when the joint resolution under which this suit is prosecuted was passed by Congress, during that entire time had proper and appropriate actual, as well as constructive, notice of the way and manner in which the grant was being administered; and that as so administered, it was during all that time in alleged violation of the so-called "actual settler" clause. See also

*Government's Exhibit No. 109-A, Volume X,*  
page 5363,

*Government's Exhibit No. 109-B, Volume X,*  
page 5365,

*Government's Exhibit No. 109-C, Volume X,*  
page 5368, and

*Government's Exhibit No. 109-D, Volume X,*  
page 5370, of Transcript of Record,

all relating to this same subject, and being separate certified copies of the respective letters contained in Government's Exhibit 109 and referred to therein. See also Defendants' Exhibit 373, Volume XIV, pages 7371-7375 of Transcript of Record, being correspondence between Secretary of the

Interior J. D. Cox, of date May 7, 1870, and Joseph S. Wilson, Commissioner of the General Land Office; letter of Joseph S. Wilson, Commissioner of the General Land Office, of date May 23, 1870, to George H. Williams, United States Senate; letter of Joseph S. Wilson, Commissioner, of date May 23, 1870, addressed to the Register and Receiver, Oregon City, Oregon, relating to the evidence of sale of the Oregon Central Railroad (East Side) to the Oregon and California Railroad Company; letter of May 20, 1872, from Willis Drummond, Commissioner, to Honorable C. Delano, Secretary of the Interior, referring to certain papers filed in his office by George H. Williams, Attorney General, for the purpose of obtaining a construction by the Department of the act of April 10, 1869. Also Defendants' Exhibit 374, Volume XIV, pages 7375-7383, consisting of certified copies of form of deed of European & Oregon Land Company; letter from I. R. Moores, Land Agent, to Willis Drummond, Commissioner of the General Land Office, of date January 23, 1874; and letter from Willis Drummond of date March 13, 1874, to I. R. Moores, in reference to lands said to have been erroneously patented to the Oregon and California Railroad Company; thus recognizing the administration of the land grant under the deed made by the Oregon and California Railroad Company and its trustees, to the European & Oregon Land Company, thus imputing notice to the United States, through its Land Department having exclusive jurisdiction and



authority under the act of July 25, 1866, to see that this grant was properly administered, and to report to the President, and he, in turn, to the Congress of the United States, any failure to administer the same in accordance with the act of July 25, 1866, and acts amendatory thereof. Defendants' Exhibit 375, Volume XIV, pages 7383-7439, of Transcript of Record, consisting of certified copies of correspondence, letters and telegrams from June 20, 1876, up to and including November 9, 1905, between the Land Department of the Oregon and California Railroad Company and the Land Department of the United States, and enclosing to the Commissioner of the General Land Office certified copies of the following:

(1) Deed of grant, bargain, release, convey and quit-claim, dated June 22, 1876, executed by Milton S. Latham, Faxon D. Atherton and William Norris to Jeremiah Criss and Starke, to 243.18 acres;

(2) Like deed dated June 22, 1876, executed by same parties to Rogers Pepiot, conveying 80 acres;

(3) Like deed dated June 22, 1876, executed by same parties to Cornelius Hackshaw, for 100 acres;

(4) Like deed dated June 22, 1876, from same parties to Reuben Draper, for 40 acres;

(5) Like deed dated June 22, 1876, executed by same parties to William L. Lucky, for 105 acres;

(6) Like deed dated June 22, 1876, from same parties to George W. Caton, for 80 acres;

(7) Like deed dated June 22, 1876, from same parties to Henry K. King, for 36.90 acres;

each of which deeds recites that these lands were patented by the United States to the Oregon and California Railroad Company, and embraced in the trust deed of that company to said trustees of date April 15, 1870, and that the Commissioner of the General Land Office had requested that company to cause the premises to be conveyed to the various parties named. Therewith was a letter of transmittal dated June 28, 1876, from P. Schulze, Land Agent Oregon and California Railroad Company, advising the Commissioner of the General Land Office of the transmittal, and that he did not send a deed for a certain other tract requested by the Commissioner in his letter of March 13, 1874. There is also in this exhibit a copy of letter from J. J. Williamson, Commissioner of the General Land Office, dated July 14, 1876, addressed to P. Schulze as Land Agent of the Oregon and California Railroad Company, acknowledging receipt of these seven quit-claim deeds executed June 22, 1876, in compliance with his letter of April 22, 1873, to these lands which were inadvertently patented to the company May 29, 1872; there is therewith also a letter of P. Schulze to the Commissioner of the General Land Office, dated July 9, 1877, advising that the company would furnish a quit-claim deed for the tracts described in the letter of the

Commissioner June 19th,—which last named letter is also in the correspondence and requests one quit-claim deed for 160.20 acres erroneously patented to the company May 9, 1871, and a like deed to Willis Osborn for 58.80 acres erroneously patented to the company July 12, 1871; also a like letter from the Commissioner to Land Agent Schulze dated April 27, 1877, requesting a deed from the company to John W. Cleaver for 19.45 acres erroneously patented to the company July 12, 1871; also letter of the Commissioner dated April 30, 1877, addressed to Land Agent Schulze, requesting a deed to Green B. Savery for 68.44 acres erroneously patented to the company July 10, 1871; also letter of Land Agent Schulze, dated August 10, 1877, to the Commissioner, acknowledging delayed receipt of letters of the Commissioner of April 27th and April 30th, and advising that quit-claim deeds to the United States for these tracts would be issued *“as soon as a mortgage trustee will have been appointed by the Court in place of F. D. Atherton, deceased”*; also letter of Land Agent Schulze to the Commissioner, dated August 10, 1877, enclosing deed to James Waldrup for 42.21 acres; also letter of Commissioner Williamson, dated September 5, 1877, to Land Agent Schulze, acknowledging receipt of deed last mentioned in accordance with the request of Commissioner of the General Land Office of date March 13, 1873, which deed is of the same form as the seven deeds hereinbefore mentioned; also letter from Commissioner Williamson,



dated September 6, 1877, to the Register and Receiver at Oregon City, Oregon, advising that the selection of this 42.21 acres by the company "*under the acts of July 25, 1866, and June 25, 1868*", patented May 7, 1871, were duly relinquished by the company June 22, 1876, upon showing that the selection was in direct conflict with the donation claim of James Waldrup. Also letter from Land Agent Schulze to the Commissioner, dated June 28, 1878, in reply to his letters of April 27, April 30 and June 19, 1877, enclosing a relinquishment of the company to certain lands, also letter from the Commissioner to Land Agent Schulze, dated February 16, 1878, acknowledging receipt of letter of January 28, 1878, and relinquishment of Company to lands described, consisting of 160.20 acres, 19.45 acres, 68.44 acres, and 50.80 acres,—a copy of which relinquishment is also in the record and recites that the lands are part of the lands conveyed by the company to the trustees mentioned by deed of April 15, 1870,—that Faxon D. Atherton died July 18, 1877, and the surviving trustees are Milton S. Latham and William Norris. The relinquishment is in the form of a deed of release and quit-claim, duly acknowledged. While the record is silent as to whether these deeds were transmitted to the grantees for record, the presumption is that they were so transmitted and duly recorded in the Records of Deeds of the counties where the tracts respectively are located. There is also in said exhibit, letter of Commissioner N. C. M'Farland,

dated August 4, 1881, to Land Agent Schulze, requesting reconveyance of lands erroneously patented to the company, advising that "the Company would be entitled to select other lands in lieu thereof, according to the provisions of the second section of the act of July 25, 1866", and further advising that "the proofs show compliance with the law, and the land absolutely vested in said claimants prior to the *act of July 25, 1866*, granting lands to said railroad company (see case of *Hall vs. Russell*, 11 Otto, 503)." Also letter of Land Agent Schulze, dated August 25, 1881, addressed to the Commissioner of the General Land Office, acknowledging receipt of letter of August 4, 1887, and advising that the company would comply with the request, but that "there will be, however, some delay in the issuance of such deed as it will require some time to obtain the signatures of the *mortgage trustees of this company*". Also letter of June 11, 1887, from Land Agent George H. Andrews, while the property was in the hands of R. Koehler, Receiver, addressed to Commissioner of the General Land Office, enclosing deed of the company requested by the Commissioner of the General Land Office in his letters of January 12th and 31st, 1885, and letter to R. Koehler of April 25, 1877, and advising that the first two pieces described were included in patent dated May 29, 1872, and the last in patent dated July 12, 1871; Commissioner Sparks, in his letter of July 2, 1887, addressed to Land Agent Andrews, acknowledged receipt of letter of June 11,

1887, enclosing deed reconveying to the United States the premises described. Copy of this deed is printed in the record, Volume XIV, pages 7420-7425, Transcript of Record. This deed is executed by Oregon and California Railroad Company, and *The Farmers' Loan & Trust Company*, which company is recited as "being the trustee or mortgagee of said lands so granted to said railroad company by said act of Congress", and recites also that the lands were erroneously patented to the company "*under the act of Congress of July 25, 1866, granting lands to said company to aid in the construction of its railroad and telegraph line therein mentioned.*" This deed bears date May 9, 1887, and is duly witnessed and acknowledged, and the United States is the immediate grantee therein and thereby became a party to the conveyance. This deed was, on July 2, 1887, transmitted by the Commissioner of the General Land Office to the United States Land Office at Roseburg, Oregon, and A. C. Jones, Receiver of that Land Office, under date of October 21, 1887, by letter advised the Commissioner of the General Land Office that he therewith returned the deed, "the same having been recorded in all the counties in which the land is situated (Linn and Lane), and being returned to this office by the Register and Receiver of Oregon City Land Office". There is in this record as a part of this exhibit (Volume XIV, pages 7426-7433) a certificate of Commissioner Sparks under date of June, 1887, certifying that the enclosed copy



of deed executed by the Oregon and California Railroad Company and The Farmers Loan & Trust Company on May 9, 1887, to the lands mentioned, is a true and literal exemplification from the files of his office, and which deed is a duplicate of the deed set out in Volume XIV, pages 7420-7425 Transcript of Record; which deed bears the certificate of R. Koehler, Receiver, dated June 8, 1887, that he approved the execution thereof upon the consideration and terms therein expressed, "pursuant to an order of the Circuit Court of the United States for the District of Oregon, bearing date February 9th, 1885, in the case of Lawrence Harrison et al. vs. the Oregon and California Railroad Company et al. of record in said Court and Cause". There is in this exhibit and record a letter of D. A. Chambers, attorney for the company, addressed to the Commissioner of the General Land Office, dated October 19, 1905, and a letter acknowledging receipt thereof of date November 9, 1905, from Acting Commissioner J. H. Fimple, with copy of deed No. 88-B, of date August 1, 1905, executed by the company as requested by the Commissioner of the General Land Office February 6, 1905, which deed is executed by the Oregon and California Railroad Company and the Union Trust Company to the United States, and recites that the lands thereby relinquished and reconveyed to the United States were, through inadvertence and mistake, patented by the United States to the company June 14, 1904. This deed is duly acknowledged, certified and wit-

nessed so as to be entitled to record, and presumably was forwarded to the local United States Land Office in Oregon for record in Lane County, Oregon, where the land is situated.

Defendants' Exhibit 376, Volume XIV, pages 7439-7457 Transcript of Record, consists of certified copies:

(a) Letter of July 17, 1868, from O. H. Browning, Secretary of the Interior, to A. M. Loryea, in regard to filing assent;

(b) Letter of May 5, 1871, from Walter H. Smith, Assistant Attorney General, to C. Delano, Secretary of the Interior, expressing favorable opinion as to validity of assignment by the Oregon Central Railroad Company to the Oregon and California Railroad Company, and that patents should be issued to the Oregon and California Railroad Company;

(c) Letter of May 8, 1871, from C. Delano, Secretary of the Interior, to A. T. Akerman, Attorney General, in reference to claims of W. E. Chandler;

(d) Letter of July 16, 1868, from A. M. Loryea to O. H. Browning, Secretary of the Interior, advising that Gaston's organization is illegal;

(e) Certificate of S. A. Clarke, Secretary of the East Side company, dated April 30, 1868, certifying that the Board of Directors of the East

Side company on April 29, 1868, passed a resolution as follows:

“Resolved, that the Oregon Central Railroad Company hereby accepts any grant of land which may have been made, or may be extended to said Company, and our Agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this Resolution to the proper authorities as provided by law to be filed.”

(Volume XIV, pages 7454-7455).

(f) Letter of May 9, 1871, of Attorney General A. T. Akerman, to C. Delano, Secretary of the Interior, in answer to his letter of May 8, 1871.

Defendants' Exhibit 376 is certified under date of March 16, 1912, to be a true copy of the originals as they appear on the records and files of the Department, and is so certified by the Assistant Secretary of the Interior. (Volume XIV, page 7440).

The letter of July 17, 1868, above mentioned, acknowledged receipt of letter of A. M. Loryea of July 16, 1868, (Volume XIV, page 7454) printed as July 16, 1869, and the accompanying paper “purporting to be an acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1866.” Secretary Browning further says:

“By law the Company was required to file an ‘assent’ to its terms and conditions, within



one year. That time expired July 25, 1867, and this paper, if sufficient for that purpose, could not now be received. I state for your information that J. Gaston, President of the Oregon Central Railroad Company, within the time prescribed in that act filed an assent which was received."

The letter of Mr. Loryea of July 16, 1868, to Secretary Browning, reads:

"I desire to notify you that the Oregon Central Railroad of which J. Gaston represents himself as President, is an illegal organization. The organization of the same name of which I. R. Moores is President and myself Vice President was made in conformity to the laws of the State of Oregon. In connection herewith I desire to call your attention to the enclosed paper and ask that it may be filed as an acceptance of the lands granted by Congress for such purpose."

The "enclosed paper" therein referred to is evidently the certified copy of the resolution of the Oregon Central Railroad Company (East Side) set out above. It is proper to call the attention of the Court, in this connection, to the fact that Congress on June 25, 1868, (Volume I, pages 13-14, Transcript of Record), had passed an act amendatory to the act of July 25, 1866, by which Section 6 of the original act was displaced and a complete Section 6 enacted in lieu thereof, which substituted section provided that Section 6 of the

original act should "be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, Anno Domini 1880." Under this act of June 25, 1868, the filing of assent was dispensed with and the resolution adopted April 29, 1868, by the East Side company accepting the grant made, and the delivery of a certified copy thereof on July 16, 1868, to the Secretary of the Interior—while not required—was evidence of the assent of the East Side company to the act, and was notice to the United States of its claim to the land grant to be earned by construction of road commenced April 16, 1868, and continued and completed as to the first section of twenty miles as required by the act of June 25, 1868. On May 5, 1871, the Department of Justice advised the Secretary of the Interior that the title of the Oregon and California Railroad Company, under the conveyance or transfer and assignment made by the East Side company, was a valid assignment of all of the land grant to the Oregon and California Railroad Company, and entitled the latter company to patents. Assistant Attorney General Smith says:

"The Oregon Central constructed the first section of twenty miles of its road and the

President on the 29th day of January, 1870, ordered the patents for portion to be issued.

On the 28th of April, 1870, the Secretary of the Oregon Central, filed in the Department of the Interior, an assignment by that Company of all its rights and interests to the Oregon and California Railroad Company, and thereupon Secretary Cox recognized the said last named Company as the one entitled to the grant given to its assignor, and gave a certificate to that effect upon the faith of which the road has been able to negotiate a large amount of its bonds, secured by a mortgage upon the lands assigned.

The Oregon and California Company have completed three additional sections, each twenty miles, of the road leading from the City of Portland to the Central Pacific in California. Commissioners have reported favorably thereon, and the President has directed the patents to issue, and the question now is, shall the patents issue or be delayed by reason of anything alleged in the communication of Mr. Chandler.

He argues 1st that the Congressional land grant was a personal trust vested in this Oregon Central Railroad Company for the public purpose of aiding in the construction of an important railroad line and could not legally be sold or transferred to another railroad company without the consent of Congress.

I agree with him in the opinions that this grant could not be assigned to another company without the consent of Congress, but I disagree with him upon the question whether the consent of Congress has not already been



given. As I construe the Act of July 25th, 1866, Congress has given such consent. Throughout the entire act it has shown an intent to deal with the assignee of the Oregon Central as well as with that road itself. \* \* \*

I am decidedly of opinion that the patents should be issued to the Oregon and California Railroad Company. If I were in doubt upon this point I shall still advise as I have done, in view of the former action of your Department sanctioned by Secretary Cox and Attorney General Stanberry and in view of the large pecuniary interest, that have arisen upon the faith of that action."

It will be remembered that the East Side company conveyed its property to the Oregon and California Railroad Company by formal deed of conveyance, for a valuable and sufficient consideration, and that it is stipulated (Volume IV, page 1558, Transcript of Record) that on March 29, 1870, the East Side company executed and delivered to the defendant Oregon and California Railroad Company the instrument in writing, a correct copy of which is attached to the Bill of Complaint as Exhibit "B" (Volume I, pages 93-126, Transcript of Record), and that it is stipulated that this Exhibit "B" is a correct copy of that deed, and that this deed was recorded in the office of the County Recorders of the several counties in which was situated any part of the lands intended to be granted by the act of Congress of July 25, 1866; and that on April 4, 1870, the Oregon and California Rail-

road Company adopted a resolution, a correct copy of which is found in Volume I, pages 26-28, Transcript of Record, and that on April 28, 1870, a certified copy thereof—together with a certified copy of the deed of March 29, 1870—was filed in the office of the Secretary of the Interior; and it is stipulated that at all times since March 29, 1870, the Oregon and California Railroad Company has assumed, and still assumes, itself to be the successor of the East Side company in and to all the forfeitures, rights of property granted or intended to be granted by the said acts of Congress. In this situation, there was actual notice to the Department of Justice and to the Department of the Interior, and thereby to the United States, of the sale and conveyance of this land grant *in solido* to the Oregon and California Railroad Company. It also appears that the Secretary of the Interior approved the record of the Commissioners as to the construction of the first twenty miles, and recommended that patents be issued for the lands opposite to and co-terminous therewith, and the President approved this recommendation and patents were issued. It also appears from the opinion of the Assistant Attorney General, representing the Department of Justice, that Secretary Cox recognized the Oregon and California Railroad Company as entitled to the grant, and gave a certificate to that effect, upon the faith of which the road had been able to negotiate a large amount of its bonds secured by a mortgage upon



the lands assigned, and that the Oregon and California Railroad Company had completed sixty additional miles of road; that Commissioners had reported favorably thereon, the President had directed patents to issue, and that Wm. E. Chandler, evidently employed by the West Side company, appeared for that company, in connection with Benjamin F. Butler, and urged that further issuance of patents be suspended upon the ground that the grant could not be assigned to another company without the consent of Congress. The Department of Justice ruled that Congress had consented in advance by the act of July 25, 1866. This construction of the grant by the Department of Justice, upon which the Oregon and California Railroad Company secured its bonds for construction of road, was adopted May 5, 1871, thirty-seven years prior to the passage of the Joint Resolution of April 30, 1908, and this construction has been continuously followed by the Department of Justice, the Department of the Interior, and the President of the United States from May 5, 1871, down to April 30, 1908, upon the faith of which the road was constructed to the Oregon-California line with funds obtained by sale of bonds secured by mortgage upon this land grant and the constructed portion of road. This construction is inconsistent with the contention now made that the words of the so-called "actual settler" clause created a condition subsequent, or that it was the intention of Congress to burden the title to these lands with the condi-



tion as to their sales, which, if broken at any time as to a single sale, would subject the title to the entire grant to forfeiture to the United States. If Congress had intended and expected that the lands could and should be sold to "actual settlers," it did not rely upon a construction of this clause for breach of which there could be forfeiture of title. At most, Congress may have relied upon the good faith and self interest of the company to carry out its policy and direction in that behalf if it could be so done, and if such contract contemplated that this covenant as to sale should run with the land. And it may be that Congress intended that the company would sell to "actual settlers" who might apply to purchase, in good faith, prior to completion of road and prior to issuance of patents therefor, or to such actual settlers who may have entered upon the lands in good faith and applied to purchase the same as such actual settlers prior to issuance of patent, as contended by the European & Oregon Land Company, as shown by Government's Exhibit No. 109 (Volume X, page 5322), Government's Exhibits Nos. 109-A, 109-B, 109-C, 109-D (Volume X, pages 5363-5373), and Defendants' Exhibit 373 (Volume XIV, pages 7371-7375). Apparently Secretary Delano was not altogether satisfied with the opinion of Assistant Attorney General Smith rendered May 5, 1871, for on May 8, 1871 (Volume XIV, pages 7451-7453), he wrote to Attorney General Akerman, enclosing a letter of W. E. Chandler, together with the opinion of Assistant Attorney

General Smith, and requested the opinion of the Attorney General so that he might submit the same to the President. In the course of his letter, Secretary Delano says:

“However, before announcing to the Counsel a second decision, I again referred to the subject with you while at Cabinet meeting. I informed you that the parties desired me to refer the question to you, and knowing the pressure upon your time, I desired to know whether you deemed it advisable to have this case formally referred for your consideration.

I understood you to advise against it, and also advise that I follow the rulings of the Department made by Secretary Cox. This being in accord with my own deliberate judgment, I acted accordingly, and so informed Counsel for the parties.

The result has been that W. E. Chandler has sent to the President an extraordinary letter, complaining, among other things that I did not consult you on the subject, and that I have overruled your opinion in a like case. I have concluded, therefore, to ask you to read Mr. Chandler's letter, herewith inclosed, and to give me briefly (to be laid before the President) your recollection in regard to the matters herein referred to. I also submit the opinion of the Assistant Attorney General, Mr. Smith, upon the legal questions involved in the whole case, which opinion I wish you to examine, and upon which I wish your opinion, that I may also submit it to the President.”

To this request, Attorney General Akerman replied May 9, 1871 (Volume XIV, pages 7455-7457), from which we quote as follows:

“In answer to your letter of the 8th inst., I have the honor to state, that my recollection of what passed at the informal conference between us, in regard to the case of the Oregon and California Railroad Company, entirely agrees with your own. I did not, it is true, examine the case with the care and deliberation which I should have exercised if an opinion had been formally called for. But my impressions were, and still are (subject, of course, to be reversed, if they appear incorrect after deliberate consideration), that the case of the Oregon and California Railroad has been properly adjudicated by Mr. Cox, your predecessor, and that a reversal of his decision by you should not be made, unless you should be most clearly satisfied that he was in error, inasmuch as the embarrassment growing out of contrary decisions under such circumstances, would be most serious.

The opinion of Mr. Smith, Assistant Attorney General, appears to me, from a cursory examination, to be a correct exposition of the law of the case.”

## V.

Under Point V, of Points and Authorities, herein set out in this brief, pages 654-793, the defendants-appellants contend that the United States cannot in equity, as a suitor, enforce the actual settler



clause, assuming that its words create a condition subsequent because

(1) The United States has waived its right, by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company, from the earliest administration of the grants to the passage and enforcement of the Act of August 20, 1912, (so-called Innocent Purchasers Act.);

(2) Because the United States is estopped, in view of all of the facts and circumstances, to attempt to enforce the same.

Evidence in the record in support of this contention may be summarized as follows:

(1) Correspondence between Joseph S. Wilson, President European and Oregon Land Company, Ben Holladay, George H. Williams, Attorney General, C. Delano, Secretary of the Interior and Willis Drummond, Commissioner the General Land Office, relating to the construction of the Act of April 10, 1869, (Government's Exhibit No. 109, Vol. X, pp. 5322-5366, Transcript of Record) in which notice of the conveyance and sale of the grant of July 25, 1866, by the Oregon and California Railroad Company and its trustees, to the European and Oregon Land Company, by deed of date March 28, 1871, and in which also notice of the deed executed by the Oregon and California Railroad Company of date April 15, 1870, to Milton S. Latham, Faxon D. Atherton and Wm. Norris, con-

veying the grant, which deed was recorded in the Records of Deeds of Multnomah County, Oregon, on or about that date—both deeds conveying the grant *in solido*—was brought to the attention of the Department of Justice and the Secretary of the Interior, together with notice of the construction then placed upon the grant, and the so-called “actual settler” clause in the proviso of the Act of April 10, 1869, to the effect that, as contended by the European and Oregon Land Company and the Oregon and California Railroad Company, and these trustees, to secure the principal of certain bonds of the Oregon and California Railroad Company then outstanding, sold to raise construction funds, “all settlers on the odd sections from 25th July, 1866, the date of the original grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869—and all others who were found on such odd sections when the land of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding 160 acres at \$2.50 per acre, but that in referring to all other persons, the original absolute grant by Act of 25th July, 1866, is in full force and effect and authorized the company to sell on such terms as may be reasonable and just to all parties, without any restriction.” See also Government’s Exhibits Nos. 109-A-B-C-D; Government’s Exhibit No. 110; Government’s Exhibits Nos. 111, 111-A-B-C-D-E-F-G, (Vol. X, pp. 5363-5452 Transcript of Record); Government’s

Exhibits Nos. 109-A-B-C-D, being a part of the correspondence referred to in Government's Exhibit No. 109, and in this connection see also Defendants' Exhibit 373, (Vol. XIV, pp. 7371-7375); Defendants' Exhibit 374, (Vol. XIV, pp. 7375-7439); also Defendants' Exhibit 376, (Vol. XIV, pp. 7439-7457); also Defendants' Exhibit 377, (Vol. XIV, pp. 7457-7463); also Defendants' Exhibit 378, (Vol. XIV, pp. 7463-7502); Defendants' Exhibit 382, (Vol. XIV, pp. 7514-7564); Defendants' Exhibit 383, (Vol. XIV, p. 7564); Defendants' Exhibit 384, (Vol. XIV, pp. 7564-7567); Defendants' Exhibit 385, (Vol. XIV, pp. 7567-7617); Defendants' Exhibit 386, (Vol. XIV, pp. 7617-7628); Defendants' Exhibits 387, 388, 389, 390, 391, 392, (Vol. XIV, pp. 7628-7631); Defendants' Exhibit 393, (Vol. XIV, pp. 7631-7655); Defendants' Exhibit 394, (Vol. XIV, pp. 7655-7680); Defendants' Exhibit 395, (Vol. XIV, pp. 7680-7720); Defendants' Exhibit 396, (Vol. XIV, pp. 7720-7758); Defendants' Exhibit 397, (Vol. XIV, pp. 7758-7792); Defendants' Exhibit 398, (Vol. XIV, p. 7792, Vol. XV, p. 7811); Defendants' Exhibit 399, (Vol. XV, pp. 7844-7858); Defendants' Exhibit 400, (Vol. XV, pp. 7858-7876); Defendants' Exhibit 401, (Vol. XV, pp. 7876-7912); Defendants' Exhibit 452, (Vol. XV, pp. 7912-7918); unnumbered exhibit, being letter from Benjamin Harris Brewster, Attorney General, to Hon. H. M. Teller, Secretary of the Interior, of date June 15, 1882, found at pages 35 to 39, inclusive, of Executive Document No. 29,



Forty-seventh Congress, second session, in answer to a letter of January 5th submitting questions arising upon an application of the New Orleans, Pacific Ry. Co. for certain lands claimed under the land grant made to the New Orleans, Baton Rouge and Vicksburg R. R. Co., by Act of March 3, 1871, which is printed in Vol. V, pp. 2512-2527. Defendants' Exhibit 263, (Vol. XIII, p. 6704); Defendants' Exhibit 264, (Vol. XIII, pp. 6704-6708); Defendants' Exhibit 276, (Vol. XIII, pp. 6721-6776); Defendants' Exhibit 280, (Vol. XIII, pp. 6776-6781); Defendants' Exhibit 283, (Vol. XIII, p. 6783); Defendants' Exhibit 284, (Vol. XIII, p. 6783); Defendants' Exhibit 288, (Vol. XIII, pp. 6835-6836); Defendants' Exhibit 293, (Vol. XIII, p. 6930); Defendants' Exhibit 294, (Vol. XIII, pp. 6932-6999); Defendants' Exhibit 295, (Vol. XIII, p. 7000); Defendants' Exhibit 320, (Vol. XIV, pp. 7167-7199); Defendants' Exhibit 321, (Vol. XIV, p. 7251); Defendants' Exhibit 331, (Vol. XIV, pp. 7263-7268); Defendants' Exhibit 333, (Vol. XIV, pp. 7268-7272); Defendants' Exhibit 334, (Vol. XIV, pp. 7273-7302); Defendants' Exhibit 335, (Vol. XIV, p. 7303); Defendants' Exhibit 336, Vol. XIV, p. 7303); Defendants' Exhibit 337, (Vol. XIV, pp. 7303-7306); Defendants' Exhibit 338, (Vol. XIV, p. 7306); Defendants' Exhibit 339, (Vol. XIV, pp. 7306-7307); Defendants' Exhibit 340, Vol. XIV, p. 7308); Defendants' Exhibit 345, (Vol. XIV, pp. 7310-7341); Defendants' Exhibit 346, (Vol. XIV, p. 7341); Defendants' Exhibit 347,

(Vol. XIV, pp. 7341-7342); Defendants' Exhibit 348, (Vol. XIV, p. 7342); Defendants' Exhibit 349, (Vol. XIV, pp. 7342-7343); Defendants' Exhibit 359, (Vol. XIV, pp. 7346-7347); Defendants' Exhibit 257, (Vol. XI, p. 5789 to p. 6454, Vol. XII.)

(2) In addition to the summary of the testimony set out under Point IV of Points and Authorities herein, set out in this brief, pages 610-653, which may be relevant and material to the consideration of the questions now under consideration, and without repeating such testimony, it will be helpful to summarize the testimony disclosed by the exhibits above referred to, following and including Defendants Exhibit 377, (Vol. XIV, p. 7457).

(a) We invite special attention to Defendants' Exhibit 377, consisting of Senate Judiciary Committee Report No. 906, of date January 2, 1883; to accompany bill S. 2301, providing for the forfeiture of railroad grants in certain cases, which, although specially introduced in evidence, is within the judicial knowledge of the court under stipulation of counsel, (Vol. V, p. 2531, Transcript of Record).

Mr. Garland, from the Committee on the Judiciary, submitted the report, and it appears therefrom that for some time prior thereto the Committee on the Judiciary of the Senate had under consideration various memorials asking for the forfeiture of certain railroad land grants, with several bills and resolutions on the subject. This report is of date

January 2, 1883, is eleven years after the correspondence between the European and Oregon Land Company, and the Department of Justice and the Land Department, and after the United States had notice of the construction placed upon the actual settler clause in the proviso of April 10, 1869, and necessarily the same construction upon Section 4 of the Act of May 4, 1870, and after notice to the United States of the transfer of the land grants to the European and Oregon Land Company and to the trustees to secure construction funds, and after Congress had been informed by the facts disclosed in the reports made by the Oregon and California Railroad Company to the United States, under the Act of Congress of June 19, 1878, (20 Stat. 169) reporting average price per acre for sales, maximum price per acre from sales, received and asked, for the half year ending December 31, 1879, and from that time, up to December 31, 1882, (Vol. IV, pp. 1590, 1623, Transcript of Record) which reports show uniform continuous non-observance of the so-called actual settler clause.

We quote from this report written by Senator Garland, afterwards Attorney General of the United States from March 4, 1884, to March 6, 1889, as follows:

“Upon full consideration of all these propositions, in connection with the various grants to be reached in this way, the committee found great difficulty in devising any one plan that



would be effectual. The grants themselves are different and do not by any means, in all cases, carry the same meaning as to the relative *right and duties of the companies and the government.* \* \* \* \*

Without undertaking to decide whether in all grants of land by the United States to railroads Congress can declare this forfeiture, the committee considered it best to adopt some measure that would avoid this question, and place the parties in attitude towards each other that would insure to each fair dealing and justice as far as can be done. \* \* \*

They propose to direct the Attorney General to institute proper judicial proceedings against any railroad companies that he may have reason to believe are in default *as to the conditions of their grants*, to bring about a forfeiture, and secure the rights of the government to the lands. \* \* \* This proceeding, however, is not to interfere in any manner with any right of the executive under his authority to enforce and execute the laws to take possession and dispose of any such lands, without these proceedings where he could have done so if no act as contemplated by the committee had passed."

In this connection, it may be noted that under the Act of July 25, 1866, (Vol. I, pp. 6-13, Transcript of Record) it was expressly provided that Congress might at any time, having due regard for the rights of the company, add to, alter, amend, or repeal the act, and it was clearly within the jurisdiction of the Land Department, and was its duty, to determine

in the first instance whether the company would comply with the grant in every particular, or whether the company would fail to keep its contract with the United States and thereby subject the lands to possible forfeiture for breach of any alleged condition subsequent.

Senator Garland, further speaking for the Committee, says:

While the committee had no doubt at all that some steps should be taken to declare forfeitures in many of these cases, yet they were of the opinion that in all cases where reasonable and proper diligence and exertions had been used by any of these companies, they should have the benefit of the same in any proceedings against them; and accordingly the committee were of opinion it would be just to allow the companies to show in defense that for one year previous to the passage of the act any substantial progress in good faith in the building of the roads, limiting this period to the first day of December, 1882."

While it is true that the primary grounds upon which forfeitures of land grants were then being urged was failure to construct the railroad aided by the grant, it is clear that all causes for forfeiture, whether for breach of alleged condition subsequent or otherwise, were within the purview of the report under consideration by Congress. This intent is illustrated by what Senator Garland further said:

"Such a law will enable the government to

get rid of all these grants of lands to railroads *that are not being used for legitimate purposes, or are misused*, or in which no efforts are being made to build the proposed roads, and at the same time to have carried out all these grants in which the companies in good faith are trying to finish their roads. In other words, while such a law would be protective of the rights of the government it would not be oppressive to corporations that are working and dealing fairly with the liberality of the government in trying to secure the *objects of those grants*. And to this end they have agreed on the bill herewith proposed, and recommend its passage."

This bill is entitled, "A Bill providing for the forfeiture of railroad grants in certain cases."

It should be read in connection with the Act of Congress of September 29, 1890, (26 Stat. 496, 499) entitled, "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of roads and for other purposes," which last named act is the legislative culmination and end of all congressional action on the subject of forfeiture of railroad grants that had been under consideration before Congress from 1880 down to that date, and which last named act in its general aspect is by its express terms limited to forfeiture of lands opposite to and co-terminous with the unconstructed portions of the roads that were to be but were not constructed at all, as indicated, with this difference, that in the



proposed bill submitted by Senator Garland, for the Committee on the Judiciary, on January 2, 1883, it was expressly provided as follows:

“Section 3. That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by *the act or acts granting lands to or in aid of it or amendatory thereof.*”

This section in the proposed bill would have expressly saved the right to the United States to declare a forfeiture of grant for breach of condition subsequent as to sale of land and would have saved the right of the United States to assert a breach of the alleged condition subsequent contained in Section 4 of the Act of May 4, 1870, or the proviso of the Act of April 10, 1869. This section should be read also in connection with Section 2 of the proposed bill recommended by the Committee, as stated, for it would seem from Section 2 that the thing which the Committee had in mind was the failure to construct or build the road, in aid of which the grant was made, for by Section 2 it is expressly provided that

“This act shall not apply to the case of any railroad (except as mentioned in section three of this act) in which, within one year preceding the passage of this act, any substantial progress *in building* the same has been accomplished in good faith, and shall be continued in the manner hereinafter mentioned, or in which,

before the first day of December, 1882, there shall have been made any substantial progress in the building thereof, and which progress shall be continued in good faith, as hereinafter mentioned."

It is apparent that the primary purpose of the proposed act was to forfeit land grants where the grant had not been earned by construction of road, and yet by Section 3 it was expressly declared "that nothing in this act shall be construed to be a waiver of any *condition or requirement* imposed upon any corporation or in respect of any such grant by the act or acts granting lands to or in aid of it or amendatory thereof." These words would apply specifically to any breach of condition subsequent in respect to sale of lands, and if these words of the actual settler clause create a condition subsequent would have had express and necessary application to any alleged breach of such alleged condition subsequent.

It will be noticed that no such proviso as Section 3 is to be found in the General Forfeiture Act of September 29, 1890, and we shall presently point out why it does not appear in the statute as passed.

Attention at this time should be called to Act of Congress of January 31, 1885, (23 Stat. 296) entitled, "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon." By this statute it is expressly provided

“That so much of the lands granted (by the act of May 4, 1870) as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be and the same are hereby declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made.”

By Section 2 thereof, it is expressly provided

“That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre; and the



Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of these rights; Provided, That the price of the even numbered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

### By Section 3

“That the act of March third, eighteen hundred and seventy-five, entitled, ‘An Act for the relief of settlers within railroad limits,’ is hereby repealed.” (18 Stat. 519)

It will be observed that this statute was passed thirteen years after the correspondence between the European and Oregon Land Company and Attorney General Williams and Secretary Delano, and after the United States knew of the sale of this grant *in solido* to the European and Oregon Land Company, and to the trustees to secure construction funds, and after official reports of the company, under the Act of June 19, 1878, (20 Stat. 169) had been filed, as required by law, showing average price per acre for all sales to date, maximum price per acre from sales, maximum price per acre asked, commencing with June 30, 1879, down to December 31, 1884, (Vol. XIV, pp. 1590-1599, Transcript of Record). These reports show that maximum price received per acre

from June 30, 1879, to December 31, 1884, was \$15.00 per acre. It is also to be noticed that Congress did not construe Section 4 of the Act of May 4, 1870, as conferring upon the vendees of the West Side Company, as persons who would be protected by their settlement, or as persons who had, by the payment of \$2.50 per acre, entitled themselves to lands even if they were deemed to be such settlers. Furthermore, by Section 2 it is apparent that the provision as to actual settlers that might be upon such lands on January 31, 1885, were such as might be there before the Railroad Company had secured title or earned the grant by construction of road, or before the lands had been surveyed or become identified as within the grant, for they were given a preference right to enter such lands within six months after January 31, 1885, under the Act of January 31, 1885, *not under the Act of May 4, 1870*, and the right to enter the same under the homestead, pre-emption or other laws as the settler might be able to do, upon payment of \$1.25 per acre, and he might do this, if thus entitled to enter under the settlement laws, within six months. If, however, such settler was not entitled to enter or acquire the land under existing laws, he could do so within one year after January 31, 1885, upon payment of \$1.25 per acre. The Government, at the same time, reduced the price of even sections to the minimum thus fixed. It is apparent that Congress did not intend to recognize the right of any so-called actual settler under Section 4 of the Act

of May 4, 1870, or to treat a person who might be upon the lands as a vendee of the company, or otherwise, as such actual settler, but intended to deal with persons who had no contract relation with the company. This is still further evidenced by the fact that by Section 3 of the Act of January 31, 1885, the Act of March 3, 1875, (18 Stat. 519) entitled, "An Act for the relief of settlers within railroad limits," was repealed.

(b) Defendants' Exhibit 378, (Vol. XIV, pp. 7463-7502, Transcript of Record) consisting of the following:

(1) Letter of Joseph S. Wilson, President of the European and Oregon Land Company, of date April 20, 1871, to Commissioner of the General Land Office;

(2) Letter of I. R. Moores, of same date, to Joseph S. Wilson.

(3) Letter of May 9, 1871, from Acting Commissioner W. W. Curtis in regard to patented lands inuring to the Railroad Company.

(4) Correspondence between Joseph S. Wilson, President of the European and Oregon Land Company and Willis Drummond, Commissioner of the General Land Office, running from March 21, 1871, to February 24, 1872, in regard to the status of lands in the grant,

in none of which is any mention made of the Act of April 10, 1869, except in the most formal way, and then only as to its effect in allowing the company to file its assent within one year from



April 10, 1869. No claim is made that such assent was necessary to be filed or that it was upon any condition as to sale of land to actual settlers or otherwise.

In his letter of May 12, 1871, Joseph S. Wilson, then President of the European and Oregon Land Company, and then the owner of the grant under its trust deed from the Oregon and California Railroad Company, joined in by the trustees of the trust deed, under which construction funds were to be realized, says:

*"The heavy expenses incurred in realizing the purpose of Congress in regard to the construction of the railway and telegraph at so distant a point made it a serious concern to the grantees to have the patents so as to make the means available that are allowed by the statute which can only be done after the issuing of the patents."* (Vol. XIV, p. 7483)

In his letter of December 30, 1871, written upon the stationery of the European and Oregon Land Company, and signed by him, as President, Mr. Wilson wrote to the Commissioner of the General Land Office, as follows:

"As I have received no intimation as to what has been done, nor acknowledgment, and as the early approval of the lists is a matter of grave and most pressing importance to the Company in view of very heavy outlays, and the necessity for making immediately available the lands which have been granted, I am constrained

again to trouble the Commissioner by asking that the work be pressed to completion, and the requisite list of approval forwarded at the earliest period possible, thereby rendering legitimate service to the Company, and obliging the undersigned." (Vol. XIV, p. 7497).

In his letter of February 24, 1872, addressed to the Commissioner of the General Land Office, written upon the stationery of the European and Oregon Land Company, and signed by Mr. Wilson as President, he says:

"What is not wanted, however, and to which there is no legal interdict, is that the lists shall be taken up, examined and tested and where the selections are found perfectly regular, and correct, and free from interference, and the usual list of approval may be furnished at the same time it would be a gratification to the Company to have transcript of the approved list, so as to be certain as to the particular lands enuring under the grant, *on which they can rely as a land fund*, and for which ultimate title as stipulated in said 4th section is to be given by patent, upon meeting the statutory requirements aforesaid. The request is therefore respectfully renewed for prompt transmission of the issued list," (Vol. XIV, pp. 7501, 7502),

thus showing the insistent demand of the European and Oregon Land Company in the interest of construction of road, and the desire of the company that the selection lists should be promptly approved and that the title to the lands granted might be vested in the company at the earliest date by patent.

(c) Issuance of patents to the Oregon and California Railroad Company under the Act of July 25, 1866, and amendments thereof, and the Act of May 4, 1870, as shown by Defendants' Exhibit 382, (Vol. XIV, pp. 7514-7564, Transcript of Record) beginning with Patent No. 1, issued May 9, 1871, for 32,517.21 acres, reciting in the patent the Acts of July 25, 1866, and June 25, 1868, and issuance of Patent No. 2, July 12, 1871, for 72,417.65 acres within place limits and 47,829.80 acres within indemnity limits, the patent reciting issuance of same under the Acts of July 25, 1866, and June 25, 1868, showing a total acreage included in these patents issued under these two acts of Congress, of 152,764.67 acres, and with no mention of the Act of April 10, 1869. Patents Nos. 3, 4, 5, 6, 7 and 8, dated from May 29, 1872, down to and including March 3, 1893, conveying 462,800.91 acres, conveyed under the Acts of July 25, 1866, June 25, 1868, and April 10, 1869. Patents Nos. 9 to 211, from June 11, 1894, down to December 7, 1906, were issued, reciting that each was issued under the Act of July 25, 1866 only, and conveying lands therein described within primary limits, amounting to 1,559,120.28 acres, and within indemnity limits 590,419.50 acres, or a total of 2,149,539.78 acres. Patents issued under the Act of May 4, 1870, were begun to be issued October 9, 1895, and extended to March 20, 1903, covering a total acreage of 128,618.13 acres. These facts show that the Land De-



partment did not regard the title to the lands patented in any wise affected by the Act of April 10, 1869.

(d) It is shown by Defendants' Exhibit 383, (Vol. XIV, p. 7564) and by Exhibit No. 14 to Stipulation, (Vol. IV, pp. 1717-1720) that construction of the first section of the East Side railroad was completed December 4, 1869, examined by Commissioners appointed therefor favorably reported December 31, 1869; such reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendations approved by the President January 29, 1870, and thereafter the construction of each subsequent section of road was completed, including the twelfth section, reports of Commissioners transmitted to the Secretary of the Interior, and by him to the President of the United States, with recommendations that each section of road be accepted, and approval of such recommendations by the President, down to November 8, 1889; and that the first section of the West Side railroad was completed, and the report of the Commissioners, of date January 6, 1872, approved, and the section accepted by the Secretary of the Interior February 16, 1872, and the second section reported on by Commissioners on May 3, 1876, and the report approved and the section accepted by the Secretary of the Interior June 3, 1876; and that pursuant to the official action of these various

officers, the lands were approved to be patented, and patents were issued in recognition that the companies, respectively, had earned the lands opposite to and coterminous with the constructed sections of road.

It is shown by Defendants' Exhibit 384, (Vol. XIV, p. 7564) by the affidavit of H. Villard, of date January 8, 1883, that he was President of the Oregon and California Railroad Company, which had succeeded to and become invested with and was at that time possessed of and entitled to all the grants, rights, franchises and privileges conferred by the Act of July 25, 1866, and the Act of May 4, 1870; that there has been already accepted and approved by the United States, as duly constructed under the provisions of these acts, those parts of the Oregon and California Railroad between East Portland and Roseburg, 198 miles in length, and between Portland and St. Joseph and McMinnville, about 50 miles in length, and that in the summer of 1881, and fully one year before December 1, 1882, the work of duly constructing, completing and equipping the remaining parts of said railroad, as defined in these acts, has been prosecuted by the company continuously, actively and in perfect good faith, at an actual expenditure of large sums of money several millions of dollars in amount) and in conformity with the will and desire of Congress, as expressed in these acts, that said lines of railroad should be speedily and thoroughly completed; and that, within the

time above mentioned, substantial progress has been made towards the completion of these lines, inasmuch as at least 45 miles of new road have, within that time, been constructed, completed and equipped in a thorough and first-class manner, and said new mileage was at that time in full operation as part of the railroad system of the company; and at least 20 miles additional to the above were then partially constructed, and further construction was continuing; that by reason of the mountainous nature of the country through which said lines were being constructed, and on account of other natural obstructions, only overcome with the greatest difficulty and labor and at enormous expense, this mileage was all that could be completed, with the utmost diligence, within the time mentioned; that at that time the company was vigorously continuing said construction, in entire good faith; and that it would continue the same without unnecessary delay until its lines were fully completed in the manner specified in the acts above recited.

This affidavit appears to have been filed in the General Land Office on the 15th day of January, 1883, and apparently was considered by the Assistant Attorney General of the United States. At the time it was so filed the company had not complied with the Act of July 25, 1866, or of June 25, 1868, as to construction of road within time, and as shown by the reports made by the company under the Act of June 19, 1878, (20 Stat. 169) had made



its official reports to Congress showing sales of these lands from June 30, 1879, for the half year ending June 30, 1883, (Vol. IV, pp. 1590-1598) in which reports the United States was advised that the company, in selling these lands, was uniformly disregarding the so-called actual settler clause, and that notwithstanding this, the Secretary of the Interior recommended approval of the lands for patent and the President of the United States caused patents to be issued for the lands opposite to and coterminus with the constructed portions of road, and the company has continuously asserted title to these lands under these patents, has sold and conveyed the same, has mortgaged the same, as shown by the record, without any action being taken by Congress looking to an attempt to forfeit the grant for alleged breach of the so-called condition subsequent claimed to be created by the proviso of April 10, 1869, and the words of Section 4 of the Act of May 4, 1870, until the passage of the Joint Resolution of April 30, 1908, under which this suit is being prosecuted by the United States.

(e) Defendants' Exhibit 385, (Vol. XIV, pp. 7567-7617) consists of the following:

(1) H. R. Report No. 1664, 1st Session, 48th Congress, subject—"Unearned Land Grants"; recommitted to the Committee on Public Lands and ordered to be printed May 29, 1884.

(2) Also H. R. Report No. 931, 1st Session, 49th Congress, subject—"Forfeiture of Lands

Granted to California and Oregon Railroad," March 8, 1886, referred to the House Calendar and ordered to be printed.

(3) Also H. R. Report No. 930, 1st Session, 49th Congress, subject—"Forfeiture of Lands granted to California and Oregon Railroad," March 8, 1886, referred to the House Calendar and ordered to be printed.

The first report, No. 1664, accompanied H. Res. 253. Mr. Lewis, from the Committee on the Public Lands, submitted the majority report, and Mr. Oates, from the Committee on the Public Lands, presented the minority report.

Mr. Lewis, speaking for the majority committee, says:

"The Commissioner of the General Land Office, in his annual report for the year 1883, after giving a tabulated statement of the various land grants made to the different States, and to corporations to aid in building railroads, *and in which the conditions of the granting acts had not been complied with*, uses the following language:

'The question of declaring a forfeiture of the foregoing grants, or any of them, is deemed an appropriate one for legislative consideration.

'The time fixed in the granting acts for the completion of the roads expired, in some instances, in 1866, and, in other cases, at other periods down to 1882' \* \* \*

"*The public demand for a definite settlement of the question*, whether a forfeiture is to be

enforced in any of these cases is constantly pressed upon my attention. I consider it of very great importance that the earliest possible action should be taken either to revive the grants or to declare them forfeited. If it be the judgment of Congress that the grants should be revived, Congress may unquestionably prescribe the conditions of such revival; and if such action should be taken, I suggest that all actual settlers on the land be saved and secured in their rights and claims to land embraced in their settlements and improvements at the date of any such revival of the railroad grant.

“Your committee have patiently and laboriously investigated the facts and law touching many of these land grants, and have reported many bills to this House forfeiting and restoring the lands to the public domain.

“Many others remain yet to be examined, in regard to which bills have been introduced and referred to your committee, and all of which have for their object forfeiture of the grant.

“*So far they have failed to find one company that has complied with either the letter or spirit of the law (at least in the opinion of a majority of the committee), and considering the enormous amount of land involved we deem it of the highest importance to take any and every step possible to protect the rights of the Government, and especially of the people, in and to the public lands which have been lavished upon different railway corporations to an alarming extent.* \* \* \*



“It is a grave responsibility for an administrative officer to disregard *any of the conditions* the lawmaker has seen proper to attach to a grant of land for public or private purposes, and the fact that it has been done *to any extent, however limited*, warrants the adoption of proper enactments to prevent its recurrence.”

This resolution, (Vol. XIV, pp. 7573-7574, Transcript of Record) recited that numerous bills had been introduced in both branches of Congress to forfeit lands granted to aid in the construction of railroads, and that many of these bills had been favorably reported to the House, and that it was important that something should be done looking to a speedy settlement of the serious and vital questions growing out of the agitation of this subject in and out of Congress; and the resolution to prohibit the Secretary of the Interior from taking any further steps to confirm, certify, or patent any lands granted to any corporation, State, or person by Congress in any case where reports, favoring the forfeiture of such land grants, had been made to either branch of this Congress, until after final action shall be taken upon such bills in Congress, or until the Supreme Court of the United States, in a proper case shall decide upon the validity of the grant.

By Section 2 of the resolution it was proposed to prohibit the Secretary of the Interior from cer-

tifying or patenting to any corporation any land grant *except where such corporation has complied strictly with all the conditions of the granting act*, and that in all cases of doubt in construing these conditions, the benefit of the doubt shall be given to the Government.

It is thus seen that this resolution reported by a majority of the Committee on Public Lands, is convincing evidence of the land grant situation at that time in Congress and of the desire to forfeit grants for failure to comply with the granting acts, and meantime to prohibit the Land Department from recognizing the right of any land grant company to enter evidence of title by way of certificate, patent, or other muniment of title. The Secretary was to be expressly prohibited from certifying or patenting to any corporation any land grant except where such corporation has complied strictly with all the conditions of the granting act, and in all cases of doubt in construing these conditions, the benefit of the doubt was required to be given to the Government. This was on May 29, 1884, twelve years after the correspondence between the European and Oregon Land Company, Attorney General Williams and Secretary Delano, as shown in Government's Exhibit No. 109, (Vol. X, p. 5322) and other documentary evidence in connection therewith, showing notice brought directly to the United States, through its Department of Justice and Land Department, of the claim of the European

and Oregon Land Company of its right to be the owner of these land grants and to administer them by sale of lands without particular regard to the actual settler clause, except in the limited way suggested by the correspondence, and showing that the company had conveyed the land grants to trustees as security for construction of road, and that this conveyance purported to convey the lands in both instances *in solido* without any regard to the so-called actual settler clause. This report No. 1664 thus under consideration by the Committee on Public Lands and Congress, at a time nearly five years after this company, as required by the Act of June 19, 1878, (20 Stat. 169) was making and had made its official reports which were required to be submitted to Congress, commencing June 30, 1879, and ending June 30, 1883, by which reports, as we have seen, it is shown that the company received an average maximum price per acre from sales of its lands of \$15.00, for a period of four and one-half years. (Vol. IV, pp. 1590-1623 Transcript of Record) It also appears from this report that the pressure for forfeiture of land grants where the companies had failed to comply with the conditions of the grants in any particular, was from settlers who had, in some instances, entered upon these lands and were anxious to know what was to be done. In this situation there was a duty upon Congress to act, if it be true, as now contended, that the company was at that time and had been during all the time, violating the so-called condition



subsequent by refusing to sell these lands to actual settlers in quantities and at the price stipulated, or had been selling these lands in excess prices in violation of the alleged condition subsequent. This is clear and substantial evidence, of contemporaneous construction, in harmony with the right of the company to sell the land without regard to the so-called actual settler clause or to sell the land in the way and manner in which the European and Oregon Land Company proposed to sell the same as to such actual settlers and is evidence of acquiescence and resulting estoppel upon the part of the United States in permitting the lands to be so sold and patents to issue for the lands as earned, thereby evidencing that the lands had been earned by compliance with the provisions of the granting acts.

Mr. Oates, from the Committee on Public Lands, expressing the views of the minority committee, and having clear reference, as it seems to us, to the bill reported by Senator Garland, *supra*, says:

“In the Senate there has been a general law proposed, and every lawyer in the United States knows, or ought to know, that not one of ‘these wealthy corporations’, as they are called in the report, can sue the United States, because the courts of the United States have no jurisdiction until there is a statute conferring jurisdiction touching these matters. The resolutions barricade every avenue of escape from the citadel and then set fire to it to force the garri-son to come out and fight fairly.”

These reports, majority and minority, are persuasive evidence that Congress was then considering *not only forfeiture of land grants for failure to construct the road but forfeiture of land grants where the company had not complied strictly with all the conditions of the granting act.* The minority offered as a substitute for joint resolution No. 253, Senate Bill No. 1445, (Vol. XIV, pp. 7579-7582). Senator Garland's bill was reported from the Committee on the Judiciary January 2, 1883, and was Senate Bill No. 2301, (Vol. XIV, pp. 7461, 7457-7463). The bills are not the same but similar in purpose. Senator Garland's bill was "A Bill providing for the forfeiture of railroad grants in certain cases," and *contained the important Section 3, finally omitted from the General Forfeiture Act of September 29, 1890, (26 Stat. 296).* Senate Bill No. 1445 proposed to confer jurisdiction upon the Circuit Courts of the United States to hear and determine all questions and controversies that might arise between the United States and any person or corporation upon the declaration to be thereafter made by act of Congress that any grant of public lands, in aid of the construction of road, had been forfeited, and to determine whether any such declaration of forfeiture had been so made as to impair the vested rights of the grantee, person, company or corporation. It was further made the duty of the Attorney General, when the law had been passed attempting to forfeit a particular grant, that he should prosecute a suit in equity against the grantee

company for the purpose of determining the rights of the parties under the forfeiture act. The bill, if passed, would have given a statute containing the essential terms of the Joint Resolution of April 30, 1908, under which this suit was brought, excepting that the proposed Senate Bill No. 1445 and the proposed bill reported by Senator Garland, from the Judiciary Committee, each was general in its character *and not, as here, limited to two vendees of two land grant companies*, and excepting also that the Joint Resolution of April 30, 1908, merely authorized the court to ascertain the fact as to whether a cause of forfeiture existed, but forfeiture was not declared by the resolution and could not *be declared by the court*, until the passage of the so-called Innocent Purchaser Act of August 19, 1912, (37 Stat. 320)

Report No. 931 on the subject of "Forfeiture of lands granted to the California and Oregon Railroad Company" was on March 8, 1886, referred to the House Calendar and ordered to be printed. Mr. Henley, from the Committee on Public Lands, submitted the report to accompany Bill H. R. 6659. Mr. Henley was then a member of Congress from the State of California, and from a district in which the lands granted to the California and Oregon Railroad Company were situated. There was a majority and minority report. The majority report recites that the Committee on Public Lands, to whom were referred sundry bills for the forfeiture of the lands heretofore granted to the California and Oregon



Railroad Company to aid in the construction of a railroad over the route prescribed in the granting act, had had the same under consideration and thereupon made their report. *The very grant now under consideration*,—that made by the Act of July 25, 1866, was the subject matter of the report, and this act is analyzed (Vol. XIV, p. 7585) and the report attempts to narrate what was done by the California and Oregon Railroad Company and its successor by way of construction of the railroad required to be constructed under this act. *Strange as it may seem*, no reference is made to the Act of April 10, 1869, although express reference is made to the Act of June 25, 1868. The report recites the fact that the “*Oregon portion had in the meanwhile been pushed southward from the northward terminus at Portland to Roseburg, a point 197 miles distant, leaving at the above stoppage a gap of about 275 miles to be built, of which nearly equal parts belonged to each of the undertaking companies.*” The *financial embarrassment of the Oregon Company* is recited. Mr. Henley, speaking for the Committee, says:

“The lands alone, it was alleged, were not a sufficient inducement, as they were chiefly broken and mountainous or infertile in character, and the work would be very costly and difficult, while the local traffic would be insignificant. The contention was that the principal value of the work remaining to be built lay in the formation of the through line; *that one of the co-operating parties was insolvent, and the*

other, though financially able, would require the consent of the State of Oregon to build within that State, which consent, it was apprehended, there might be some difficulty in obtaining. \* \* \* It is claimed by both of these companies, and with some show of reason, that the construction of this railroad is of very great importance, both as respects its necessity to the military defense of our west coast and its benefits to the mining and agriculture of that great Northwest region. \* \* \* Against the forfeiture of this act the railroad companies above named have made the following points in their argument: Their contention is, that the grant of land was made by Congress to these companies and to their assigns, *for the purpose of affording a great public highway that would be available to the United States Government in time of war and for the transportation of freight and passengers, and thus develop and open up a section that now stands greatly in need of this character of communication; and they have laid great stress upon the title of the act, which is 'An act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon.'* Against the policy of forfeiture these companies have contended that section 5 of the act prescribing the conditions of the grant is definitive of the intention of the Government to bestow the grant upon these companies as a compensation for the construction of the road. They urge, since that was the purpose of Congress in granting these lands, that nothing has occurred since

*then which could reasonably or should reasonably, induce the Government to withdraw its grant, even though it were authorized to do so by the technical terms and provisions of the act. \* \* \** It was further claimed that it would be grossly unfair and unjust to cut off the opportunity to receive these lands now that the whole work is on the eve of completion and the ground is covered with workmen, no faster progress in the situation being practicable. They urge that cost and difficulty are of the essence of the grant and not time.

“In this connection they have stated to your committee, *and it is undoubtedly true*, that very few railroads in the country present anything like the topographical difficulties that lie upon this route. *They allege that three successive high mountain ranges are to be crossed; some twenty tunnels in the whole gap, with as many important bridges, and much inevitable delay from snows, etc.* These things were urged in support of the *equitable plea for indulgence*. The all-sufficient answer to this plea, aside from what has been urged hereinbefore, is that the Government *cannot afford* at this particular time to be indulgent or *waive any advantage it may possess in the letter of its contract*. These grants of lands were made upon the theory above adverted to. The law was plain that the road must be completed within a certain specified time. *If this has not been done, then there has been a breach of the condition subsequent of which the other party will take advantage.*”



*Not one word is said by Mr. Henley or the Committee with reference to the fact that the Oregon end of this grant could have been forfeited for alleged violation of the alleged condition subsequent contained in the proviso of the Act of April 10, 1869, and likewise the grant made May 4, 1870 for breach of Section 4 thereof, although he was at great pains to discuss the financial embarrassment of the Oregon Company and the right to forfeit that portion of the grant. It will be remembered that Congress did not undertake, by the Act of April 10, 1869, to impose the actual settler clause upon the lands granted to the California and Oregon Railroad Company in California, so that the anomaly exists of a "public land policy" commented upon by the learned judge of the court below, which was applicable to this very grant in the State of Oregon, but not applicable to the very same grant and the very same class of lands in the State of California; although less than three years intervened between July 25, 1866, and April 10, 1869. It is also important to note that the court below interpolated or read into the Act of April 10, 1869, words of forfeiture which are not in the act and which the court would not have read into the act but for this so-called "public land policy". The minority of the committee on Public Lands, three in number, reported a substitute for the bill proposed by the committee. The substitute was entitled, "A Bill to resume the title to a portion of the lands granted to aid in the construction of a railroad from the Cen-*

tral Pacific, in California, to Portland, in Oregon, (Vol. XIV, p. 7599). *It was exceedingly short and proposed to repeal so much of all acts and parts of acts making grants of land in aid of the construction of a railroad from the Central Pacific, in California, to Portland, in Oregon, as applies to lands coterminous with such portions of said road as were uncompleted on the first day of January, 1886, and that all such lands were to be resumed as part of the public domain. Nothing was stated as to forfeiture of the grant or any portion thereof, which had been earned by construction of road, as far as constructed, or forfeiture of the unearned portion for or because of any breach of the alleged condition subsequent in the "actual settler" clause of April 10, 1869. On January 1, 1886, the Oregon road was constructed and in operation from Portland to Ashland, (Vol. IV, pp. 1717-1720) and there remained only the unconstructed portion of the road from a point one and one-half miles south of Ashland to the boundary line between Oregon and California, a distance of 24.125 miles.*

Under Point VI of Points and Authorities, hereinafter set out in this brief, pages 794-864, the defendants-appellants contend that a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation, a condition subsequent must be capable of performance within a reasonable time,

and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company to any part of these lands, it could not sell these lands to "actual settlers," for the price named, in the quantities specified, the condition became impossible of performance, and was thereby discharged. The same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws, in accordance with the terms of the condition. Proof of these facts, to the satisfaction of the court, by the voluminous record, is competent and convincing to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance. The proof also shows that the even sections within the limits of the grants, were of the same character, and that they were unfit for disposition under the settlement laws in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 81) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1891, and all other laws allow-



ing appropriation of the public lands, and on September 29, 1890, (26 Stat. 496) passed the General Forfeiture Act, and on August 20, 1912, enacted the so-called Innocent Purchasers Act, (37 Stat. 320), based upon the report of the House Committee on Public Lands, to the effect that these lands sold in alleged violation of the "actual settler" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws. The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors.

The evidence in the record in support of this contention may be summarized as follows:

The testimony of B. A. McALLASTER, Land Commissioner, (Vol. IV, pp. 1938-1977 Transcript of Record) is explanatory of the maps admitted in evidence, of the character of the lands granted, the relation of the land grant to the Willamette Valley, Umpqua Valley, and Rogue River Valley, which were lost to the grant because of prior settlement, and explains the map adopted, by which the character of the lands unsold, involved in this suit, was ascertained as to their timber character. It is unnecessary to repeat this testimony, but the attention of the court is specifically called to the same, to show that the testimony produced on behalf of the

defendants upon this subject, is necessarily accurate and conclusive. (See also his testimony Vol. IV, pp. 2008-2010, 2013-2016 Transcript of Record) We cannot refrain, however, from quoting from his testimony, as follows:

“About 10,000 applications to purchase quarter sections of timber land belonging to the company at \$2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. These applications are made usually in this way. Some person comes into the office with a bunch of applications, anywhere from 5 to 10, up to 50 or 100, and presents one application and tenders the sum of \$400.00 with it, and that being rejected, this person follows by presenting another application, and tendering the same \$400.00, and that being rejected, the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be, and in nearly all cases the blanks used by these so-called applicants are printed forms. He has prepared a memorandum showing the number of applications of that class, up to a certain time and whether or not several persons have made application for the same quarter section. This memorandum was prepared about March 1, 1909, and shows the applications that were in his hands at that time. There were 7991 applications in his hands on March 1, 1909, covering 6168 quarter sections, or in some cases less. Occasionally an eighty acres. The entire num-

ber of applications up to July 30, 1912, would, he thinks, approximate 10,000. When this table was made up on March 1, 1909, there were 4749 tracts of land each covered by one application; there were 1097 tracts each covered by two applications; 256 tracts each covered by three applications; 54 tracts each covered by four applications; 8 tracts each covered by five applications, and four tracts each covered by six applications."

(Vol. IV, pp. 1958-1960 Transcript of Record)

One of the advertisements identified by the witness, and which appeared in an Eastern paper, is as follows:

## "OREGON

### OREGON TIMBER

United States government gave 6,000,000 acres choice timber land in Oregon to railroad company forty years ago, to be sold at \$2.50 per acre; 1,300,000 acres remain unsold; now worth \$50 per acre; male and female American citizens only can now apply for 160 acres of this land at \$2.50 per acre; only \$75 payable now. For full particulars address J. M. Krieder, 806-7 New Bank Com. Bldg., St. Louis, Mo."

(Vol. IV, p. 1964 Transcript of Record)

There appeared also in the Evening Telegram, published at Portland, Oregon, under date July 18, 1907, the following:



“FOR SALE—TIMBER LANDS  
TIMBER—

Parties wishing to make application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all the papers and location, are within the reach of all.

HOWSE & MILLER,  
66 Sixth Street.”

There also appeared in the Portland Journal of July 19, 1907, a notice as follows:

“TIMBER

WE ARE STILL IN A POSITION to locate several parties on railroad lands in southern Oregon, cruising better than 4,000,000 feet per quarter section; for making tender to the company and filing papers in the clerk's office afterward, location, including all attorney's fees, we charge the sum of \$25. Now come and look into this proposition, if you have never bought any lands from the company heretofore, remember this does not interfere with any of your other rights, call and get full particulars.

HOWSE & MILLER,  
66 Sixth Street.

Open evenings. Phone Main 6188.”

also:

“TIMBER LANDS.

Intending purchasers desiring to be located upon lands with heavy timber in the land grant

of the Oregon & California railroad in southern Oregon can secure the same by acting quickly. Location fees, including all necessary attorney's fees, are reasonable. Address J. E. Verdin, Grants Pass, Or."

also the following:

"TIMBER CLAIMS. The present time now affords you the opportunity to locate yourself upon a splendid timber claim, accessible to both railroad and driving streams; cruise ranges from 4,000,000 to 9,000,000 feet. Price \$2.50 per acre. We locate and you purchase. Address P. O. Box 1206, Tacoma, Wash."

also the following circular headed:

"Land Grant is Basis of Suit,"  
appearing in the Evening Telegram of Portland, Oregon, September 16, 1907, as follows:

C. H. COATES

J. H. HORSMAN

"COATES & HORSMAN.

Railroad Timber Lands \$2.50 per acre, ranging from 3,000,000 to 6,000,000 ft. to quarter section. Direct purchase. No rights required. Telephone Main 7245. Office 415-416 Mohawk Block.

Spokane, Wash."

also the following:

"OREGON TIMBER LANDS.

You now have an opportunity to apply (without interference with homestead rights)

for 160 acres of valuable timber and agricultural lands in Oregon at \$2.50 per acre; timber averages 4,000,000 to 8,000,000 feet per quarter section (cedar and fir); accessible to railroads and rivers; close to Pacific Ocean and in a desirable climate; limited to 160 acres to each applicant; locating fees very reasonable.

FORREST LAND CO., 612-613  
Shukert Bldg."

also the following:

"\$150.00

\$150.00 is all the money required to get 160 acres of timber land in Oregon cruising from 3 to 6 million feet of good merchantable timber. No prior timber or homestead applications affect this, as it is not Government land. For full information call at

OREGON DEV. CO., 1110 and 12 Call  
Building."

(Vol. IV, pp. 1964-1970 Transcript of  
Record)

Volume XVIII, pp. 8820-9045 Transcript of Record, consists of Defendants' Exhibits 267, 270-273 both inclusive, 274, 313, 367-371 both inclusive, and Government's Exhibit No. 124.

Defendants' Exhibit 267 shows a panoramic view and blue print plat of Township 7, South Range 7 West, and the western portion of Township 7 South Range 6 West, with affidavits.

Defendants' Exhibit 268 shows a panoramic pic-



ture and blue print map of a portion of Township 20, South Range 1 West.

Defendants' Exhibit 269 shows a panoramic picture taken from northeast of southeast, and southwest of southwest in Township 4 North Range 3 West.

Defendants' Exhibit 270 consists of 93 views, including among others the claims and improvements thereon, of Julius F. Prahl, and others, who claim to be "actual settlers" upon the lands described, involved in this suit, and who are cross-complainants herein. These photographic views are particularly instructive as illustrating the character of the land, and the testimony in relation to the same shows conclusively that the lands were chiefly valuable for timber, were so applied for by the applicants, and that to clear the land would cost relatively more than the lands are worth at the present time, for any purpose, and that these lands could not be cleared within the lifetime of any applicant, excepting by the expenditure of great sums of money.

Defendants' Exhibit 273 consists of 84 views, with notations thereon, showing cabins on certain lands within the limits of the grant, but in the even sections, as illustrative of the character of the lands involved in suit.

Defendants' Exhibit 274 consists of six views.

with notations thereon, showing various views in various parts of the grant.

Defendants' Exhibit 317 consists of four pictures, with notations thereon, showing views in different parts of the grant.

DAVID LORING, a witness on behalf of defendants, and who entered the employment of the company on March 1, 1882, (Vol. V, pp. 2187-2228 Transcript of Record) was an employee in the Land Department, although connected with the survey of the extension of the line from Roseburg, south. He showed his familiarity with the administration of the grant, from that date down to the time of his resignation, in October, 1894. Speaking of his knowledge of the character of these lands, and their accessibility to actual settlement, or the establishment of homes thereon, he testified as follows:

A. I had occasion to go over the greater part of the lands south of Roseburg during my term as right of way agent. Also after that every year I took two weeks in the mountains hunting, and at a different locality every year, for upwards of fifteen years, and I that way became very conversant with the country and the nature of the land. I can't remember any large tracts which were remote from the immediate valley, which would be easily settled and upon which a man could make a living. There were some small places which would make a very good residence and perhaps could make a garden,

but he would have to clear the heavy timber to do anything further, and they were not very near together.

Q. Were these parcels that were capable of being occupied for a home site, for a garden and dwelling, small tracts generally?

A. Almost always.

Q. And were they or not widely separated from each other?

A. Almost invariably. (Vol. V, pp. 2201-2202 Transcript of Record)

Q. Now what is the fact, Mr. Loring, as to whether or not, during all the time you were connected with the company in its land department, the company did not undertake to sell its lands that it did sell at the best price that it could obtain, to anyone who wanted to buy, without regard to two and a half an acre, or without regard to the area, other than these cases where these pre-emption people had, as you say, in the early days gone upon some of these lands where the company preferred them? What is the fact as to how that was done?

A. We always got the best price we could.

Q. And did you, or not, sell more or less than one hundred and sixty acres, as the circumstances seemed favorable to the company?

A. We sold as much as the man was willing to buy.

(Vol. V, p. 2208 Transcript of Record)

Q. Well was there a time during your connection with the company when there began an inquiry



for these outlying lands that had hitherto had no market value, and the inquiry was on account of their timber values?

A. My impression is it was after 1894, the high-water; scarcely much of anything before that.

Q. Well now, was this inquiry all at once, or was it gradual?

A. It was gradual and increased as the Michigan and Wisconsin and Minnesota timber men came out here.

Q. Now that, as you remember, was not earlier than 1894?

A. I think not. There may have been a few scattering cases.

Q. These timber lands, about which these inquiries were made and about which I have inquired, were not in the valleys that I have mentioned, were they? A. No.

Q. They were in the Cascade Mountains, were they not, and in the Coast Mountains, chiefly?

A. Yes.

(Vol. V, pp. 2195-2196 Transcript of Record)

Q. Now, Mr. Loring, your recollection is that the substantial demand for timber lands began in 1894, or about that time?

A. Somewhere after 1894; about that.

Q. There were a few scattering sales, you said, before, but the substantial part of the sales of timber lands in large quantities took place after that?

A. Yes, except this large sale in eastern Multnomah, which was made before our time.

Q. To whom? A. Neppach, I think.

Q. Oh yes, and then there was that sale to the Gardiner Mill Company, too, that was made before your time? A. Yes.

Q. So that down to the time, speaking generally, the conditions of the market were such that there was not much demand for these lands, except by settlers and in small quantities and for a small price? That is true in a general way, is it not?

A. Yes, generally.

Q. And the greater part of the large sales, that is, sales of large quantities to single purchasers and for a price considerably in excess of two dollars and a half an acre, took place after this demand for timber land arose, which you describe as having occurred about 1894, or a little afterward?

A. That is correct.

(Vol. V, pp. 2225-2226 Transcript of Record)

CHARLES W. EBERLEIN, Acting Land Agent, made a detailed, accurate and voluminous report, with map attached, Defendants' Exhibit 309, Vol. XIII, pp. 7022-7142 Transcript of Record. We are justified by the testimony in the case, in claiming that the report made by him as to the character of these lands, is accurate, and quote therefrom as follows:

"All of the records of examinations of the land in the grant by particular tracts, made during all the years prior to April 18, 1906, were destroyed in the fire in San Francisco of that date. The work of restoring this lost data is enormous and will consume much time and money. Up to the present time it has been possible to restore only a small percentage of that data. However, a very careful estimate has been made by the two different persons who from long association with the grant in the field and who by their judgment and experience in land and timber appraisement are best qualified to testify as to values and character of land in the grant. Their report shows 1,496,640 acres covered with timber and unsuitable for agriculture; 703,652 acres of grazing land unsuitable for agriculture, and 7320 acres that might be used for agricultural purposes at the present time, but which acreage consists of small isolated tracts, many of them remote from transportation and settlements, and scattered in small bodies in different places throughout the whole extent of the grant, along creek bottoms, and on hillsides. They are not easily saleable because more lands may be had and demand does not equal supply. The remainder of the grant consists of 150,000 acres of steep hillsides and rocky cliffs not timbered and not fit for agriculture or grazing, but are waste land. Of the 2,200,292 acres of timber and grazing lands as above, it is estimated that about 250,000 acres might be reduced to conditions suitable to agriculture by clearing the ground of timber and stumps,



but the expense of clearing the land would greatly exceed the value of the land after it was cleared. Note: At the present time in Western Oregon the cost of clearing lands of stumps, etc., and preparing it for agriculture ranges from \$50 to \$150 per acre."

(Vol. XIII, pp. 7022-7142 Transcript of Record)

J. B. EDDY, Tax & Right of Way Agent, and acquainted with the country for many years, describing the topography of the lands within the limits of these grants, as related to Defendants' Exhibit 259, (Vol. XIII, p. 6698 Transcript of Record) testified:

"The territory known as the Willamette Valley is practically all in yellow within the 20-mile limit of the grant made to the Oregon and California Railroad Company of date July 25, 1866, and is all that portion of the map north of Cottage Grove to Portland, a distance of about 125 miles, roughly speaking. On the east side of the Willamette River it is practically level from Eugene to Oregon City. On the west side it is level in Lane, Benton and Polk Counties; Yamhill, Washington and Columbia Counties are more rolling. It was taken up largely under the old Donation Land Act, in the early days of the settlement of the state. \* \* \* The bulk of that land covered with yellow, not taken by these wagon road grants, is agricultural land. There are large areas of the Willamette Valley that are open plains; French Prairie, Howell Prairie,

Tualatin Plains, and the Albany Prairie, and quite a number of others of lesser note. The sides of this field in yellow, begin to rise up gradually, are foothills—foothills of the Cascades on the east side, and foothills of the Coast Range on the west. In Polk County the foothills begin practically at the town of Dallas. East of Dallas it is level. West of Dallas it is foothills, rising up to tall mountains and to timber. The large body of land in yellow in the vicinity of Roseburg and Oakland, in Douglas County, outside of the Roseburg and Coos Bay Military Wagon Road grant, were settled under the Donation Law in the fifties. The lands marked in yellow that were thus settled are small prairies and foothills. The large body of yellow along the creek from Ashland to the Rogue River was settled in the early fifties under the Donation Land Law and the Pre-emption and Homestead Laws. That is the section known as the Rogue River Valley, and from the junction to Bear Creek with the Rogue River southerly to Ashland, and is a valley mostly prairie, open country. The Siskiyou Mountains are at the south end. The summit of the Siskiyou Mountains is about ten miles this side of the Oregon and California boundary; and the summit is about fifteen miles from Ashland, on a direct line. Ashland is about twenty miles from the summit by the wagon road, but in a direct line it would be perhaps twelve or fifteen miles. Cottage Grove is approximately 140 miles from Portland. Roseburg by railroad is 198 miles from Portland. Ashland about 343 miles

from Portland. He cannot speak from knowledge as to these lands in the Willamette Valley in their native state being covered with any kind of timber; he can only speak from information; that there was on his first appearance in the valley extensive growths of fir and oak, mostly second growth fir and oak grubs-scrub oaks. These lands in the valley were not called timbered lands in any sense as compared with these lands in the mountains. The lands in the valleys are such lands as, when cleared, make first class agricultural land, and the lands in the mountains, when they are cleared, would not be worth much, if anything. This second growth fir and oak grubs in the Willamette Valley is good for cord wood."

(Vol. V, pp. 2557-2561 Transcript of Record)

R. A. BOOTH, formerly of Booth-Kelly Lumber Company, an experienced man of affairs, thoroughly acquainted with the lands involved in suit,—referring to Defendants' Exhibit 332, (Vol. XIV, p. 7268 Transcript of Record) being maps showing the lands of the Booth-Kelly Lumber Company, and the Wentworth lands, known as timber lands,—testified:

"That these lands of the Booth-Kelly Lumber Company thus indicated on these maps, are chiefly valuable for their timber—except those that have been cut over." (Vol. V, p. 2577 Transcript of Record) \* \* \* "These lands, (referring to the Wentworth lands) are



chiefly valuable for their timber. Speaking of the character of these lands, with the timber cut off, they are ordinarily termed stump lands, the stumps still remain and all of the heavy debris such as does not burn readily with fires that are run over them for the purpose of clearing them as well as they reasonably and easily can be done for the purpose of protecting the remaining forest; they are hillsides, mountainous. The lands of the Booth-Kelly Lumber Company now owned in Lane County and in Linn County adjoining those in Lane, a bit more than half of them, or about 75,300 acres out of a total of about 136,000 acres, were acquired from the Oregon and California Railroad Company, and were originally part of this grant to that company.

\* \* \* The timber lands owned by the Booth-Kelly Lumber Company, as shown on these maps, are in the western foothills of the Cascade Range. They are along the small creeks which are tributary to the Willamette River, the different prongs, and in the hillsides and ridges between the streams. They are all mountainous and hilly lands, except such as they find on benches formed by old slides and erosions and the narrow creek bottoms. The soil varies. It is all more or less rocky. Some of it is dark alluvial soil on the benches. Some of it is red. Some of it is rocky ridges. It has no value except for the timber, where the timber is standing, because the light is excluded, and there is no growth of vegetation that is valuable. After they are cut off and the light debris burned, so as to

give a coating of ash, they are good grazing lands. Grass grows readily wherever it is seeded, and they form good pasture lands. If it is seeded immediately after burned, with such tame grasses as are in ordinary use in that locality, they can all be used the greater portion of the year, if the timber is cut off and the debris burned and then seeded in the stumps. The high lands perhaps would be covered with snow during three or four months of the year, and only the lower lands could be used. From his knowledge and investigation, the cost of clearing these lands of the stumps to render them suitable for plowing, where there is any soil that could be adapted to pasturage or grazing or agricultural purposes of any kind, varies greatly because of the different number of trees on the ground and the different character of the soil in which they grow. It would range anywhere from \$50 to \$500 an acre.

Q. Now, let me put to you this question. Suppose that an intending settler should apply to purchase one of these quarter sections in the state of nature in which it was before any of this timber was cut off, and should offer to the company, seeking to purchase it, \$2.50 an acre, under this Act of April 10, 1869, go on the premises as an actual settler, and there to make his home as an actual settler. I wish you would state to the court whether or not in your judgment such land is adapted or was adapted to actual settlement in quarter sections in that way.

A. It is not adapted to settlement, and settlers could not make a living on it until after the timber was removed, because of shade excluding the light and preventing any vegetable growth.

Q. Would or would not such settler be able to make a living on these lands for himself, or for himself and family, without cutting and selling the timber therefrom? A. He would not.

Q. What, then, is the chief value of these lands and of lands similarly situated in this grant? A. In their virgin state?

Q. Yes, that is what I mean.

A. The lands to which I refer belonging to the company, and those intermingled, are chiefly valuable for their timber.

Q. What would you call these lands then, what class would you put them in, agricultural or timber, or stone or grazing, or what? A. Timberlands. (Vol. V, pp. 2577-2583 Transcript of Record)

Witness further testified:

“That he was familiar with the unsold lands of the Oregon and California Railroad Company in Lane County; some of them in Linn, Douglas, and Josephine, and that the lands of the Booth-Kelly Lumber Company are similar to the remaining lands of the Oregon and California Railroad Company that are intermingled and lying in the same vicinities. He would call these unsold lands timber or burned over lands. They are essentially the same in soil or in rock or in topography, in a gen-



eral way, as the lands of the Booth-Kelly Lumber Company, and he would say as to the ability of a settler to make a living on these lands in their native state, that the settler could not do it. \* \* \*

The highest price that he knows, of timber investors paying for this class of land per quarter section, taking the best quarter section in Lane County, is about \$1.00 per thousand on a stumpage basis. There are quarter sections that would be worth \$10,000 at that rate. \* \* \* The increase in value of timber lands and timber holdings in all parts of western Oregon, since the purchase by the Booth-Kelley Lumber Company of these lands, has been quite marked. In fact Booth-Kelly Lumber Company was the first large buyer from the Oregon and California Railroad Company, to do an interstate business. The Booth-Kelly Lumber Company demonstrated that the timber had value and was a fair competitor with other fir timber shipped from coast points. When that was known, buying became general. Large timber buyers have made investments in Western Oregon and now have holdings there, from Wisconsin, Michigan, Minnesota, Illinois, Iowa, and other points, and also by people in Oregon. He considers that the Booth-Kelly Lumber Company was the pioneer company in demonstrating the fact that these timber lands when accessible to transportation, had a value resulting from the manufacturing of the timber into lumber and its shipment. Then later investors from these states mentioned, gradually came into this market,

and from that time the market gradually appreciated. He can name quite a number of these people who have thus come from these states and made investments in various parts of Western Oregon in the timber sections; Charles Green, the Wentworths, the Wright-Blodgett people, various people from Saginaw, Michigan, the Danahers, and others, from Detroit, the Drew Timber Company, and many others. The investments of these people extended to timber lands of Western Oregon in different localities, both within and without the grant. From the date of the organization and operation of the Booth-Kelly Lumber Company, the price of timber lands in Western Oregon has been gradually appreciating, and he thinks, it is continuing. This market has developed in all of the counties of Western Oregon where there are timber lands. (Vol. V, pp. 2583-2588 Transcript of Record) \* \* \* He has lived in Oregon all his life, and most of the time in Western Oregon. He commenced lumbering first in 1880, and has been interested in it at all times since, and has been acquainted with the value of these timber lands, or their market value, or whatever value they may have had, from 1880 down to the present time. These timber lands of the Oregon and California Railroad Company had no market value about 1880 of consequence for timber purposes, or otherwise. At times small tracts, 40 or 80 or 160 acres, were purchased by small mills for local use, and at the time in the 80's when the railroad was extended

from Roseburg south, there was some little market developed in that way for railroad use, but not in any other way. He thinks that these lands first began to have a market value about 1898; that their purchase was the first of consequence. About 1898 all the principal valleys of Western Oregon had been settled in a general way, and these valleys were used mostly for agricultural and grazing purposes. The first large claims were taken under the Donation Land Act and subsequent acts for homesteaders, the pre-emption law and public entry. In 1898 there was little land in the valley belonging to the railroad companies. There was considerable in the foothills that was purchased for agricultural and grazing purposes. Prior to 1898 there was no demand in the region of the holdings of the Booth-Kelly Lumber Company by purchasers, or by any one, for these timber lands of the Oregon and California Railroad Company. When Booth-Kelly Lumber Company went in there, these timber lands of the railroad company were all offered for sale. There had been no purchases of any consequence. The timber lands of Josephine County were purchased earlier than those of the Willamette Valley. The timber lands there were mostly covered with pine, and had uses different from fir, and the operations followed immediately there, after the completion of the railroad. The chief value of these lands was their timber. \* \* \*



Q. What would you say as to the character of the soil there, and as to the fitness for any particular use after the timber was removed?

A. The most of the pine that we operated was taken from the granite soils. It grows there on that class of land more than any other, at least in all the regions near the railroad where we operated. The soil has little value after the timber is removed. There is, however, a red soil in the country, in that section where the pine also grows, that is valuable for fruit purposes.

Q. What would it cost, roughly speaking, to take the stumps out of this land that you refer to in Josephine County, and to make it arable, where there is any soil for that purpose?

A. It would vary, I think, from \$20 to \$50 an acre. The trees are scattering, and there is but little underbrush.

Q. Less stumps per acre on that character of land than on the lands in Lane County?

A. Yes, and they are more easily removed. (Vol. V, p. 2590 Transcript of Record) \* \* \* He did not think that he stated in his testimony that these timber lands had no value and now have no value excepting for timber that is on them, but he said, and repeats, that that is their chief value. He thinks that they have some value after the timber is removed. He thinks that the reforestation is entirely problematical, but it is demonstrated so far as their value as pasture is concerned. The men who own these timber lands, who have logged them

off, in his region, are considering the question of what to do in that respect. The beginning of the market for timber was when the Booth-Kelly Lumber Company had demonstrated that by manufacturing the timber into lumber and shipping the same, there could be something realized out of the timber. (Vol. V, pp. 2629-2630 Transcript of Record)

\* \* \*

Q. Suppose the Oregon and California Railroad Company had in 1906 or 1907 offered for sale all of these timbered lands to so-called actual settlers in quantities not exceeding 160 acres and at a price not exceeding \$2.50 an acre, and had sold them to so-called actual settlers or persons who would go actually and build a cabin and live on the land for six months, or whatever the time, three months, no time being fixed in the statute, and the title of the company had vested in these actual settlers, how long, in your judgment, Mr. Booth, would it have been until these actual settlers acquiring these lands at \$2.50 an acre, could have resold them to timber buyers and timber investors and mill men at a large advance; and how long would it have been until most of these lands would have passed into timber investors or timber men for the purpose of development? Q. You may answer.

A. I think your question is at what time they could have done that?

Q. Yes; and what would they have done probably?

A. Well I could answer it perhaps more accu-

rately by referring to the conditions in the Mohawk or Wendling Basin. When we purchased the lands of the railroad company there, about all of the even sections had been taken either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along Mill Creek, and as I recall now in two places where the lands had been cut over in part and the logs floated down the stream to Coburg, and there were two families living there, the families, except the husband, remaining on the property, but the husbands were away at work. And with that exception there was no one in that region. And of course they could not make a living on them, and did not attempt it, and there was no opportunity given them until our mill was established there, which was about 1898.

Q. What became of the title to these even sections?

A. We purchased them.

Q. That is to say, their chief value was for the timber, and the party holding the title disposed of them for that purpose?

A. That is right.

Q. And in your judgment that would have been the result if these lands had been sold to actual settlers under this \$2.50 an acre—

A. It is the result of all the lands we own.

Q. Well, from your knowledge of the character of the lands that you own, the same thing would apply to other lands in the grant of the same class? A. Yes, sir.” (Vol. V, pp. 2632-2634 Transcript of Record.)



A. C. DIXON, Manager of the Booth-Kelly Lumber Company, testified that he is the person who made the statement before the Committee on Public Lands of the House of Representatives, March 12th, and 14th, 1908, on Res. No. 48, instructing the Attorney General to institute certain suits, etc., which resolution was afterwards passed, and became Joint Resolution of April 30, 1908, under which this suit was brought, and that his statement, (Vol. V, pp. 2642-2646 Transcript of Record) was a correct statement of facts at the time he made it, and was his testimony. We quote therefrom as follows:

“That he thinks he knows, in a general way, the present market value of stumpage of white and sugar pine. It is another very difficult question to answer. It is from \$1.00 a thousand to \$2.50, and depends very largely upon accessibility to transportation and availability for immediate use. Arthur Hill, who appeared before this committee and made a statement, was, probably at that time, the largest stockholder in the Booth-Kelly Lumber Company. He then lived at Saginaw, Mich., but is now dead. Probably with one or two others, Blodgett and the estate of Arthur Hill control a majority of the stock of the Booth-Kelly Lumber Company, although he is not sure. They are very large holders of stock. No policy as to the best use of logged-off lands of the Booth-Kelly Lumber Company has been settled upon. It has been actively discussed several times and he thinks covered by what

the witness Booth said, discussing the policy of reforestation, the disposal to settlers, and the possibility of grazing and pasturing lands. He has no means of knowing what would become of the titles to these timber lands if the company had sold them to actual settlers in quantities not exceeding 160 acres at a price not exceeding \$2.50 per acre, and had made these sales, say, in 1906. The titles that had been given to individuals before that time largely went into the hands of the lumber companies and timbermen. He has no personal knowledge of the lands that the so-called actual settlers have applied for, excepting from newspaper reports and court records.

Q. Well, what would be, in your judgment, the value of the best quarter section of the unsold land of the Oregon and California Railroad Company? What would it be sold for at private sale without being forced, for the purposes of the timber holdings or the timber that is on the same, within your knowledge?

A. The best possible price that could be secured would be from some one who was operating close to that section, right up against it, could use the timber quickly, you said quarter section, or section?

Q. Yes, 160 acres of the best timber land that is left.

A. I should say from eight to ten thousand dollars." (Vol. V, pp. 2654-2656 Transcript of Record)

Witness further testified that the following statement made by him before the Committee on Public Lands, was then, and is now, correct. "The reason for that is this: the land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1600 acres, nor any other number of acres, and made a living for himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now." (Vol. V, p. 2659 Transcript of Record)

Witness further testified that the following statement therein made by him was then, and is now, correct.

"We think that there is no question about the original purpose of the Government having been literally carried out in a much better way than it could have been under actual settlement. In this regard, Secretary Fisher, in talking to me the other day, said that if the lands were of the character I said they were, the Government made a tremendous mistake in 1866 in granting to the railroad company lands of a character not susceptible to settlement and then asking the railroad to sell them only to actual settlers. Now, they did do that, and you must know without seeing photographs of the timber, that these lands are timber lands, or we would not have them, because we are in the timber business only. Now, if the Govern-



ment did make this mistake 40 years ago, we ask you here that we be relieved from the ill effects of it. \* \* \* We have done the larger part of the work necessary to make that land valuable for cultivation, and nobody wants to buy these lands now as homesteads at any price. Eighty-five or ninety per cent of them are useful only for reforestation, and we have not started to reforest them because we do not know to whom they belong. We have spent the necessary money to clear them of timber, and if the intention was that actual settlers should make homes on these lands, how much less useful for this purpose would they be if the timber was still standing."

Witness testified that he thought the words "nobody wants to buy these lands now as homesteads at any price," contained in this statement, were not sufficiently full as to the use to which the lands could be put. He stated that they could be used only for reforestation, at least 80 or 85 per cent. He should have said reforestation or pasture, because he knows they are used for that. It was an oversight that he did not say so. He further testified before the Committee on Public Lands, at that time, as follows:

"The Chairman: what is the general description of the lands which your client holds? Mr. Dixon: They are all timbered lands, all covered with fir timber. They are rather hilly, usually along a little canyon with a creek running down the center. We have five timbered bodies, each one

along a creek or river. We like to have them that way on account of the facilities for operation. The timber is cut and hauled down to the creek; then we build dams and float it out to the river or railroad it out." Witness testified that that statement is correct, except perhaps in using the word "all". The lands are all timbered lands technically, that is incorrect because there are a few acres now and then that are not in timber, but the statement is to all intents and purposes correct. Those acres that might be capable of cultivation are widely separated from the rest, in spots here and there throughout the grant. (Vol. V, pp. 2660-2662 Transcript of Record)

Attention is called also to hearings before the Committee on Public Lands of the House of Representatives, on H. R. 22002, concerning the Oregon and California Land Grant, April 2nd, and May 2nd, 6th, 8th, and 25th, 1912, (Vol. VI, pp. 2669-2698 Transcript of Record) which statement Mr. Dixon testified was made by him before the Public Lands Committee, and that that statement was correct at that time, and states the facts as he wishes them to be considered in his testimony. In the course of that statement he says:

"The land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1,600 acres, nor any other number of acres, and make a living for

himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now."

This statement is a part of the report of the Committee on Public Lands, and under the stipulation of counsel in this case, is admissible in evidence, even though not verified by the witness.

Mr. Dixon, on April 10, 1912, at the request of the chairman of the Committee on Public Lands of the House, made a written statement addressed to the President, (Vol. VI, pp. 2701-2703 Transcript of Record). At that time Mr. Dixon was representing, primarily, the Booth-Kelly Lumber Company, and at the same time representing the owners of at least 90 per cent of the lands covered by forty-five separate suits brought by the United States against purchasers of what are known as Oregon and California granted lands, and referred to in this record as the forty-five so-called Innocent Purchasers suits. . Speaking of these lands, Mr. Dixon says:

"The lands in our possession are practically all such as are not capable of cultivation until after the timber is removed, and the stumps cleared from the land, and then a major portion would only be useful for purpose of reforestation. These lands never could have been put into the hands of actual settlers and actually settled upon, for the reason that a settler could not make a living on 160 acres or any other number of acres of these lands. We had used



them in developing the country in the only way in which they could have been used, and in this use we have spent millions of dollars in building railroads, developing the streams, and building sawmills, and are now furnishing employment to thousands of men, my own company having employed at the time the resolution of April 30, 1908, was passed, in the neighborhood of 1000 men, and our company was in process of development, so that within a few years we would have been employing from three to five thousand men—very many more than the number of men that could have been provided with 160 acres each from the lands in question. \* \* \* He has heard all of the testimony of Mr. Booth as to the availability of this land for grazing and other agricultural purposes, and thinks that his testimony is generally correct upon these questions. It is true that the more the settlers could get for timber on the lands, the more money he would have for development purposes, but he does not think the value of the timber would have anything to do with the settlement. If the settler could sell the timber on these timbered lands, it would certainly have the effect to help rather than retard the settler. He does not think the value of the timber would have any bearing on his testimony in regard to the use of the lands for dairying or other agricultural purposes. Solid bodies of timber lands, in a general way, are essential to practical milling; the removal of the timber is also essential to any subsequent use of the lands in this vicinity for grazing or other agricultural use, referring

now to lands that have heavy growth of timber upon them. It is true that if the railroad company should withhold permanently the alternate odd numbered sections in this timbered region involved in this suit, particularly in these localities with which he is personally acquainted, the necessary effect of that would be to prevent logging off the lands and prevent their ultimate subjection to grazing or other agricultural use, such of them as are adapted to that use. The railroad company controls practically all transportation facilities from Eugene south to the southern boundary line of the state, that is, with reference to the territory within the exterior boundary lines of the railroad grant, and has controlled it since the railroad was constructed. The meetings referred to in his testimony and that of Mr. Booth were called, as far as he knew, primarily to object to the advance in rates threatened in 1906, and to rates that were considered unfair and these protests in regard to the land grant developed at these meetings were the first that he heard. The principal complaint was against traffic matters, unfair and unjust rates, as they thought at that time, at least, and the matter of withholding the lands for settlement, the matter of the railroad company building its own mills to saw their ties, and other things of that character, were also discussed, including withholding the lands from sale. The principal object of the meeting at Eugene, so far as he knew of it, and he was one of the Committee on Arrangements, was to discuss traffic matters. Personally he did not know

of the resolution in regard to the sale of grant lands until about the time the meeting was called to order. There was no commercial or industrial reason at any time since he has known these lands, as to a majority of the lands, why these lands could not have been sold in tracts of 160 acres and at a price not exceeding \$2.50 per acre. He would not speak as to all of these lands, because he does not know. The vast majority of them could have been sold at that price at any time since he has been connected with the lands, in 160 acre tracts. He is not thoroughly familiar with the Timber and Stone Act requirements, but these lands could have been sold to individuals, in his opinion, at any time that they had an opportunity. He does not think the railroad company had to charge more than \$2.50 an acre in order to develop the country. He would say that perhaps 55 or 60 per cent of the logged off lands of the Booth-Kelly Lumber Company have been logged off since the year 1905. There have been practically no sales made at all of land grant lands by the purchasers of such lands since this agitation concerning the limitations upon the sale of the land by the railroad company, commenced in 1906. With reference to the limitations upon the sale by the railroad company of these lands, the Booth-Kelly Lumber Company has repeatedly refused to buy grant lands since 1906, and refused to sell these large bodies of timber. Including the holdings of the Booth-Kelly Lumber Company and their timber lands in that vicinity and for that matter the other timber



within the exterior boundaries of this railroad grant, consists almost all together of fir and pine. It takes a number of years for these trees of long growth to reach maturity. There would be no very great change in a period of 25 or 30 years, nothing that would be noticeable except to an expert or some one making a critical examination. The conditions are approximately the same in October, 1912, as they have been ever since he has been acquainted with the land, and from the age of the trees were in the same condition in 1912 as they were 30 or 40 years ago without more than a slight change in the growth of the trees. \* \* \*

Q. Now in your letter of April 10, 1912, to the President, referred to and submitted to the Committee on Public Lands of the United States Senate, as you have heretofore identified it, you have used this language: 'Within the next several years a great deal of irritation was created in Oregon by reason of the refusal of the Oregon & California Company or the Southern Pacific Company, to place a price on these lands or offer them for sale, and as a result of this irritation a number of commercial and other trade organizations adopted resolutions condemning this course on the part of the railroad company, and asking that some step be taken, to compel them to dispose of the lands.' Referring to that, and refreshing your memory from that statement, what is the fact in that respect. Is that correct?

A. That is a correct statement." (Vol. VI, pp. 2702-2710 Transcript of Record) Witness further testified "that he is not positive, but thinks that Senator Mult, State Senator of Jackson County at that time, introduced the resolution before the meeting at Eugene in 1906, relating to the sale of these railroad lands, but he is not sure that he was the one who introduced the Memorial in the Legislature of 1907. It is his recollection that the resolution that Senator Mult brought to the Eugene meeting was introduced and adopted at that meeting at Eugene. That resolution and all the others that he ever knew anything about were simply urging the company to dispose of the lands. He never heard of the matter of forfeiture until 1908, when he was in Washington.

Q. That is to say, the demand of the public in these meetings that you attended or that you knew of, was that the company be required to dispose of the lands as they had heretofore disposed of them, for the purposes of use to those who had use for them?

A. I don't know as to the disposing of them as they were heretofore disposed of, but the general idea and desire, as I interpreted it, was to have them sold and disposed of at a reasonable price. I think there were a great many thought they ought to be sold at \$2.50 an acre, but a great many others didn't care." (Vol. VI, p. 2700 Transcript of Record)

Witness further testified "that there was no particular desire, that he knew of, to have these timber lands sold to actual settlers. He never heard the idea advanced in the community that these lands could be utilized for actual settlement.

Q. Would actual settlers have purchased these lands for actual settlement or for the timber that is on them?

A. I don't know how to answer that question. If they had been actual settlers they could not have been purchasing them for the timber that is on them. But if they had been purchased they would have been purchased for the timber that is on them.

Q. There occurred a protest in this case about actual settlers. We have some 7,000 in this record pretending, some of them, to have actually settled upon the best timber lands in the grant, and others to have applied for the very best timber lands in the grant unsold, and for \$2.50 an acre, in 160 acre tracts, and there have been some 7 or 8 applying for the same quarter section, according to the record. Now, would these lands have been purchased by men to settle on them, or for the timber, if they had been sold at \$2.50 an acre?

A. As far as the lands I am familiar with are concerned, they would have purchased them only for or chiefly for the value of the timber that is on them.

Q. You base that judgment upon the history of the disposition of the lands in the even sections of the same class, do you not, in part?



A. Largely, yes; the fact that I don't think they could do anything else with them, a big portion of them.

Q. You mean that they could only use them for the timber that is on them? A. Until the timber was taken off.

Q. Their chief value, then, would be the timber?

A. I think so." (Vol. VI, pp. 2711-2712 Transcript of Record)

F. A. ELLIOTT, State Forester, testified, referring to Defendants' Exhibit 259, (Vol. XIII, p. 6698 Transcript of Record) as follows:

"The character of the land in general is rough and mountainous; that is, the land itself. \* \* \* all lands that were considered unfit for cultivation were designated as grazing lands when denuded. Taking Southern Oregon, beginning with Douglas County, there is a great deal of land, among the unsold portion, that is barren, rocky, or covered with chaparral or brush, practically worthless for any purpose, that was classed as grazing land, simply because it was of no value for anything else. It has more or less brush, chaparral and all kinds of brush on the land and is rocky, very rough land. There is more or less of that scattered all through the grant, back in the mountains and foothills. He presumes Douglas County has more than any other kind of this character, of worthless land, because there is more railroad land in Douglas County. Josephine County would probably have a higher

percentage of that kind of land than any other county. Offhand he would say that 40 per cent of the lands in Jackson and Douglas Counties would be worthless. The heaviest and most valuable timber lands of the grants, are in parts of Columbia, Washington, Multnomah, Clackamas, Yamhill, Polk, Benton, Linn, Lane, and Douglas counties. There are tracts of pretty good timber in Jackson and Josephine Counties, also in Lincoln County. Coos County is a very heavily timbered county. The comparative stand of timber on the unsold lands, compares favorably with the timber on the even sections, and with the timber in Western Washington and in other parts of the world. It is just about an average of the timber in this state, with the exception that some of the very heaviest bodies of railroad lands have been sold. Generally speaking, he is familiar with these lands conveyed to the so-called innocent purchasers by the company, aggregating something over 400,000 acres, and they are the choice selected timber lands of the grant, up to the time these sales were made. There is a great deal of timber land in the grant which is left, that is substantially the same, but at the time these sales were made, the land that was sold was more accessible. The remaining lands now probably would not run quite as good in the stand of timber, but these lands are becoming more accessible all the time, and at the present time (1912) these unsold lands would be practically of the same quality of timber.

Q. What, from your knowledge of the timber lands of this company, both those now owned, and those heretofore owned and sold to these innocent purchasers, and from your knowledge of the timber lands in the even sections in Western Oregon, within the limits of this grant, and co-terminous with the unsold portion, has been the highest market price paid for any particular body of this timber land, quarter section or otherwise, where the sale was a bona fide sale, made in due course, the seller selling because he wanted to sell, didn't have to, the purchaser buying because he wanted to buy and was able to buy? What is the best price for any quarter section that you know of, that has been paid?

A. Well, the best price that I absolutely know of was \$10,000.

Q. Where was that situated?

A. That was in Lincoln County. I am not quite sure—I will have to look at that map to see whether that is within the grant either. It may not be. No, it is not. No, this is outside of the grant. (Vol. VI, 2717-2719 Transcript of Record)

Witness further testified as follows:

“He does not know just where the claims of the Lafferty defendants, so-called, John L. Snyder and about sixty-seven or sixty-eight others, are located, but knows all granted lands in Columbia County, quite well, and has cruised quite a good deal of it. These lands are generally very heavy timber, of the rough, mountainous country, and he would think these quarter sections in this best timbered



area, would very easily average anyway \$3,000 or \$4,000. Some of them no doubt would bring a good deal more, but he does not know where these claims are located, and has not been in there since they were located.

Q. Now, taking this grant in its entirety, and based upon your knowledge of the same, obtained by cruising that which you have cruised, and by examinations made by you as an examiner, and other means of ascertaining the character of the land in person, by traveling over the same on its trails, from your knowledge obtained in your official capacity as State Forester, and having supervision of the fire patrol of the timber lands of the State of Oregon, including these and the lands in the even sections as well, and taking into consideration all the knowledge that you have of these lands that are unsold, involved in this suit, that are shown on this Defendants' Exhibit 259, in colors, in green, I wish you would state to the court what per cent of that grant in your judgment, is suitable for actual settlement for agricultural or horticultural or other such purposes?

A. What per cent of the land is agricultural land?

Q. Yes, that would be available for any agricultural or horticultural use.

A. Well, I should say from five to ten per cent.

Q. Now, suppose, Mr. Elliott, that the company had sold these lands, or would now sell these lands, in this grant, and particularly the timbered portion

thereof, and that portion which is chiefly valuable for timber, to the so-called actual settlers, at \$2.50 an acre, in quantities not exceeding 160 acres, and give them a good title to each quarter section, and these purchasers or actual settlers, having this title to these timbered lands, should desire to make the best investment that they could make, the best disposition or use of the land which they could, what would become of the title to these lands, in the ordinary course of business? Who would acquire these lands, and for what purposes could they be used, and would they be acquired, if you know? You may answer.

A. What would these lands be purchased for? Was that the question? Q. Yes.

A. They would be purchased for the timber, no doubt.

Q. What would become of the title to these lands? Where would the lands go shortly?

A. They would go into the large timber holdings. Of course, occasionally, a man might log a quarter section off himself, and keep the land, but it would be very seldom that that would happen.

Q. From your knowledge of the disposition of the lands in the even sections, coterminous with these, where titles had been acquired under the Homestead Act, or under the Timber and Stone Act, or other public laws of the United States, what has become of the lands in the even sections, where patents have been issued by the United States to these various parties, mainly?

A. It has very largely gone to large timber holders. Of course there are claims scattered all over the country that still belong to the original claimant.

Q. What is the chief value of these lands that have a value?

A. It is timber.

Q. Now, there has been some testimony in this case that some of these lands have been classified by the cruisers of the company as grazing lands, and especially after they have been denuded of the timber. What uses, if any, could the so-called grazing lands be put to, and, in what way can they be said to be grazing lands, and what is the class of lands that you have classified as grazing lands, other than these worthless lands that you have spoken about already?

A. Well, the reason for classifying the lands as agricultural or grazing lands when they were denuded, was simply for the purpose of having a classification. Now, there was a time when we thought that all the land when it was denuded would either have to be used for agricultural or grazing purposes— That is all the uses we knew for it. But under present conditions, and since the National Forests have been created, these lands largely, very largely, should be used for growing timber on.

Q. What do you mean by that?

A. It should be kept as permanent timber land. Nearly all the lands in this grant are lands that should be used for growing timber on.



Q. You mean reforestation? A. Yes, reforestation.

Q. I will ask you to state whether or not these people who have logged off their lands, these large timber owners, who have manufactured their timber, cut off their lands, have determined yet what to do with the logged off lands, if you know.

A. Very few of them have. Of course there are some lands that they are clearing up, and putting into cultivation. Take along the Columbia River and places where it is susceptible of cultivation, they are using it. But otherwise it has generally grown up to young timber or brush, and not being used at all. (Vol. VI, pp. 2720-2726 Transcript of Record)

Q. Suppose that an actual settler, or person denominated as such in this record, should apply to the company for the purchase of a quarter section of this so-called grazing land, that is, land that is not chiefly valuable for timber, and the company should sell this quarter section to him, at the maximum price of \$2.50 an acre, or less, and he should be expected to go out upon the property with his family, if he had one, support himself or his family by having this 160 acres enclosed, pasturing his stock on this 160 acres, if he has any stock, make his living for himself or his family, and a home there, what, in your judgment, would be his ability to do that?

A. Well, I don't know of any quarter section, don't call to mind any, that I think a man could make a living on. In fact, I know of quite a number of places where 40 and 80 or 160 acres have sold a number of years ago, generally to fill out a piece of land, maybe a little fairly good land on this, to fill out a quarter section on Government land, for instance; but I don't recall to mind now any quarter section that the company has ever sold since I have been with them that a man has gone onto it and actually made a home, and made a living on that quarter section.

Q. Suppose that the company would sell one of these best quarter sections of timber land to this so-called actual settler, at the maximum price of \$2.50 an acre, and he should be expected to go out on this land to make a home for himself and his family, if he had one, what, in your judgment, would be his ability to make a living, for himself and his family, on this timbered quarter section?

A. It would be impossible." (Vol. VI, pp. 2726-2727 Transcript of Record)

Witness further testified "that there are very few, if any, entrymen who took homesteads within the limits of this grant on the even sections on the timbered area on the lands at the present time. They stayed on the lands long enough to get title to it, and have abandoned it and their improvements have gone to rack lots of times, and generally you might say they have no improvements left on them.

The improvements in the beginning were just make-shifts as a general thing. Occasionally one would find a claim with pretty fair improvements, maybe 5 or 10 acres in a fair state of cultivation, but this is largely now grown up to brush. These lands in the timbered portions of the even sections thus homesteaded are now largely owned by large timber owners. \* \* \* His opinion as to the character of these unsold lands involved in this suit applies, generally speaking, to the even numbered sections intervening those lands. There may have been a quarter section taken up here and there that would support a family, and there might have been a quarter section sold years ago, but the land that is now vacant, that is now in the hands of the railroad company and the lands that are not held by settlers, or not being cultivated or lived upon, he would say as far as he knows, there is none that will support a family. The length of time it would take to grow timber large enough for milling purposes on logged off land, depends on the location. Where the red and yellow fir grow one gets fairly good small saw timber in fifty to seventy-five years, good piling and some logs out of it. Pine timber would take longer. At present prices the present growth of timber would average about \$3,000 a quarter; that would be a very conservative estimate of the valuation on it. For timber lands say \$20.00 an acre, referring to the value of timber. He thinks the only practical use that can ever be made of that land is with proper methods of reforestation,



to reforest it and get a new crop of timber about every seventy-five years. In seventy-five years from now it would probably be worth as much as the present crop is at this time, anticipating an increased price for the timber. At present prices it would not be worth so much. In his judgment there is approximately 4,600,000 acres of land within the exterior boundary limits of this grant that will never have any practical use excepting that of reforesting and getting a new crop of timber about every seventy-five years. This includes the land in the immediate vicinity of the Southern Pacific Company's mill at Marcola, that is the main portion of it. There may be little strips of land along near the Mohawk Creek that would be of more value for agricultural or grazing purposes, but the main portion of the land is of more value for raising timber. The country there is quite rough and generally is too rough for agricultural purposes." (Vol. VI, pp. 2761-2762 Transcript of Record)

HOMER D. ANGELL, testified, (Vol. VI, pp. 2764-2787 Transcript of Record) among other things as follows:

"He thinks he is familiar with the stand of timber in Western Oregon, which would be deemed commercially valuable. He gained his knowledge chiefly from his work in the Government service, in surveying timber lands. His work has been quite largely in timbered areas, and it was necessary to his report, to characterize the topography of the

land, including the timber upon it, and the chief value that he ascribed to the land, and his experience in making these surveys and reports was in Oregon, and especially timber lands in Oregon, Washington and Idaho, and some portions of Montana. In each instance, the claims upon which these cabins were constructed, and upon which these parties whose names he had given, had made claims, that he examined, were taken upon lands that had a very heavy stand of timber, and there was no instance where a claim was made on lands that would not be classed as timber lands. What is considered a stand of timber per thousand feet board measure in Western Oregon that would make it commercially valuable for timber, depends somewhat upon its location, but his general experience is, that if there is a million feet to a quarter section, unless it is so isolated that it would be impracticable to market it, that it is valuable for timber. He has been over a considerable portion of the lands involved in this suit. He has been in Klamath County, but could not definitely say whether he has been on the portions of the grant in that county, but he has been pretty well around in the timbered area of that county. He has been along the road from Ashland to Klamath Falls, and on most of the prominent roads, leading out from Ashland. He did some surveying in Klamath County several years ago, near Ashland, but does not recall the township. The timber through which he went where he made these surveys, was of good quality and a good stand of

timber. A portion there, is exceptionally valuable for Oregon timber. It is what is called, he believes, sugar pine, and various qualities of pine, not very common in this state. But the major portion of timber is fir. He has been through Jackson County from several different directions, and especially in the timber. He surveyed, he thinks, at least one township in Jackson County, but on Williams Creek. He went from Jacksonville, and it is not a great way out there, west. He has been over lands of the company in the Williams Creek country in Jackson County. The stand of timber in there is not so good as the general stand in some sections of Southern Oregon. The timber is more scattering, but the land in that township is valuable only for timber, in his estimation. Outside of the timber lands, and outside of the valleys of the Rogue River and streams that lead into it, in Jackson County, in his opinion, the lands are of little value. These lands are rocky, covered with very thick brush, and scattering timber in places. There are open places, but outside of small tracts along streams, they do not seem suitable for agriculture, and there is a very poor stand of grass, for grazing purposes on the major portion of it. The brush that grows over a good portion of this land that he has thus described, is buck brush, commonly called, and manzanita, and these have no commercial value whatever of which he has ever learned. He has been over quite a portion of Josephine County out from Grants Pass. In a general way, these lands are similar to the lands



in Jackson County, although the timber is better, he thinks, than in Jackson County, and perhaps more mountainous. The soil of the lands in Josephine County, on these uplands, is of poor quality, not adapted to agriculture. A good portion of the soil is a sort of red soil. There is a great deal of decomposed granite soil. In fact he has had occasion to ship some of that granite from Grants Pass for use at Portland in making walks, and it is used as ballast on railroads to some extent. He does not know of any use that it can be put to for agricultural or horticultural purposes. He has never been in Curry County. He has been over Douglas County quite generally. He did considerable surveying for the Government in that county, ran about thirty miles in length of the Willamette Meridian, he thinks, in Douglas County, and the lands of the company with which he is familiar in that county, are very mountainous and covered with heavy timber or undergrowth, with the exception of isolated tracts on creek bottoms or streams, and are not suitable for agricultural purposes. They are chiefly valuable for their timber, and there are portions suitable for grazing, but not to any great extent, back in the mountains. The chief stand of timber, a very valuable stand in that country, is fir. He has been over portions of Lane County in the timbered area; in fact, up on the McKenzie River, and north and south. He has made some examinations of timber lands in Lane County in a general way, looking to see the quality of the timber, and

if there were timber lands vacant, but has not made any examination, or been over any of the lands west of Eugene, in the Suislaw country belonging to the company, or other timber owners. The lands which he examined in Lane County, or has seen, were principally tributary to the McKenzie River. They were very high mountainous lands, covered with timber or old burns grown up with undergrowth, and the chief value of these lands covered with timber, were for their timber. It was practically its only value under known conditions. He knows of no use to which these burned over lands in their present condition could be put, but he presumes that if they could be denuded of the brush so that the grasses might grow, they would be suitable for grazing, but the cost of putting them in such shape that they would be suitable for that purpose, would be prohibitive. He has been in the Eastern portion of Linn County in the timbered area, in the Santiam country, up from Lebanon. He did some surveying on the Santiam, in township 10 South, range 4 East, but is not sure that this is in Linn County. He has been over a considerable portion of the company's lands in the eastern part of Linn County, and especially in connection with Government surveying. The chief characteristic giving these lands value, is their timber; practically their only characteristic, other than isolated portions. These portions that might be utilized for some agricultural purposes, are small tracts, and his experience has been that there is no tract other than just a few acres, that

is suitable for agriculture, at least without an enormous expense. These tracts are isolated and separate from one another, and lie chiefly along streams. There are certain level patches on divides that might be adapted to agriculture, but no body of land of any considerable size. He has not been in Lincoln County to any extent. He has been over portions of the timbered area of Marion County, and the lands, according to his information remaining unsold in the grant in that county, are mountainous and rough, and portions of them are covered with a good stand of timber, and their chief value is for the timber. There is a considerable area of burned over lands in Marion County among those lands. They are covered with stumps and standing dead trees, and heavily covered with undergrowth. Such lands have practically no value under modern conditions, of which he knows. He has been out through portions of Polk County, and has been on and examined some of the lands of the Company. The lands that he had to do with in Polk County were timbered lands, and portions of them were in old burns, and those that were covered with timber were chiefly valuable for their timber. The burned over land is of very little use without a great deal of expense in attempting to clear it. He has been over portions, but not over the whole of Clackamas County. He has been in places over the timbered lands on the Clackamas River. These lands are timbered, with the exception of portions that are scattering burns. The chief value of the



lands belonging to the company that he has examined in Clackamas County, was their timber. He has crossed over the mountains going from North Yamhill to the Coast in Yamhill County, over the headwaters of the Trask, and in going that way he presumes he would see or go over unsold lands of the company. The company's lands are scattered through there in the odd sections, and he thinks it would be impossible to go across, without crossing the company's lands. These lands and the adjacent even sections are mountainous, and considerable portions of them are covered extensively with timber, a good stand of commercial timber, and in places there are burns. He has to some extent been over the company's lands in Multnomah County, up towards Latourelle Falls, back from the Columbia River. These lands are very mountainous, exceptionally so, and covered with a heavy growth of timber. Portions of those lands perhaps have the heaviest growth of timber in the grant. He has been in the vicinity above Latourelle Falls, and towards Larch Mountain, and these lands have an exceptionally good growth of timber. It is his impression that he has not been over any of the lands in Washington County. He has been over roads leading into Tillamook County, which passed through the mountains, and in doing so, had to go over the timber lands. And from his knowledge of these lands in Tillamook County, he would say their chief value was for the timber. There is an excellent stand of timber on the mountainous lands in

Tillamook County. He has been in Columbia County, out in the vicinity of these claims, the pictures of which were identified by him, and he examined somewhat the character of the lands surrounding these claims. The general character of the unsold lands of the Company in Columbia County is very heavily timbered and covered with a very heavy undergrowth. Their commercial value is for the timber only. According to his understanding of the value of timber, these claims of 160 acres each, are worth from \$5,000 to \$20,000. The market value of stumpage on such timber in Western Oregon runs from 75 cents to two or even three dollars, owing to location with reference to ability to get out. He has not dealt in, bought or sold timber lands, but knows of them being bought and sold. He has quite a general knowledge as to the value of timber, for the reason that he had considerable to do with it at the time he was connected with the Oregon and California Railroad Company. The lands that were sold, the stand of timber was taken, and he placed valuations upon it, and then he had to do with the value of timber other than that. He surveyed in the Forest Reserves, but not for the purpose of locating the reserve itself. He has surveyed for the Government, lands that were in the reserve. He has been through Coos County, and thinks he surveyed a small fractional township in that county, in the timbered area, which had an excellent growth of timber. The character of the lands which he surveyed in Coos County is

very rough and heavily covered with undergrowth. Its chief value is for its timber. He was reared on a farm in eastern Oregon, and lived on a farm until he was about fifteen years old, and since that time has some knowledge of farm life from observation in this country, particularly in Western Oregon.

Q. Now, suppose the company had sold these lands to so-called actual settlers, in quantities not exceeding 160 acres, and at a price not exceeding \$2.50 an acre, and the actual settler had obtained a good title to the quarter section thus sold to him, and it was covered with this stand of timber or with the timber that is on these unsold lands, how long do you think it would be after the so-called actual settler got his title at \$2.50 an acre, that he could sell that land to timber investors?

Q. And what would be the best use that he could make of that land?

A. Practically the only use he could make of the land would be to sell it for its timber, or sell the timber. My experience has been, in surveying in the timbered areas of this state, as well as other states, that lands acquired by homestead from the Government on the timbered areas are never occupied for any appreciable period after title has been acquired. I suppose that in all the lands that I have surveyed, and that I have been connected with since 1892, there were not half a dozen that were acquired either by homestead or by purchase, that the parties lived on after they secured their title.



Q. What did they do with the land?

A. They moved off, the buildings went into decay, and the small portions that were cleared were soon overgrown with undergrowth, and if there was timber on the land, the lands were sold to holders of large timbered tracts.

Q. Would that be the experience of these lands if the title was passed to these so-called settlers, in quantities of 160 acres at \$2.50 an acre?

A. It would.

Q. Now, suppose that a settler was expected, under the Act, to go out there and live on one of these quarter sections, like some of these photographs which you have taken here, and to make a living for himself and his family on that quarter section, and to confine his stock that he might own and might pasture to the quarter section, what, in your judgment, would be his ability to make a living for himself or his family on that quarter section.

A. In my opinion it would be impossible to make a living off the land itself. If the land was contiguous to roads, he might cut wood and haul that to market and make a living, or he might by trapping or hunting; but by making a living from agriculture on the land, it is an impossibility.

Q. Could he make a living by grazing on the land?

A. There might be some isolated claims that he could, in some portions of Southern Oregon, but in the mountainous regions of Tillamook County or

Yamhill County, Columbia County, or in the Cascades, along the border of the Cascades, where the company's lands are now located, it would be impossible in practically every instance to make a living by grazing.

Q. If he undertook to live on any of these quarter sections by means of pasturage, would he or would he not have to have an out range besides?

A. It would be impossible to make a living off any one of these timbered quarter-sections by grazing, being confined to that quarter only, in its present condition.

Q. Suppose a man went up into these big burns, picked out a quarter section that was burned over, or that did not at the present time have any considerable amount of timber on it, and undertook to make a home there for himself and his family, put some of this land to grass in the stumps after burning off the debris, do you think, or do you know of any quarter section within the limits of this grant where a man could go and take his family and fence his quarter section and make a living by pasturage on that quarter section?

A. I do not think there is a quarter section in the grant that could be used for that purpose. One of the main reasons why I am inclined to that opinion is that these lands are in high altitudes, and there is considerable snow falls there, and it lies on for a long period, and it would be necessary to raise hay in order to winter stock, or else take them to some other place during a large portion of

the year. And a great deal of this land, when we begin surveying in June, the snow is very deep, especially on the north hillsides and all the mountains, and does not go off until midsummer, and then snow begins to fall in September in a great many places. As soon as we have the fall rains in the valley, it is snowing on the mountains.

Q. Some of these lands under the testimony here have been classified as grazing, and there has been some testimony that these lands when logged off could be seeded, after the fire had run through and burned over the land, and that the land could be pastured in that way over considerable areas. Do you not think, or do you think, that would be practicable, that it could be done?

A. Not practicable under present conditions. From my own personal knowledge, I know of thousands of acres that have been logged off that are admirably situated for that thing, if it could be done, but they are not utilized for that purpose, and I presume the chief difficulty is that as soon as the timber is removed, there is a very dense growth springs right up, and that may all be taken off one year, and next year it is all on there. It is almost impossible, seemingly, without taking the stumps and plowing the land thoroughly from year to year for a number of years, to eradicate the undergrowth. . . .

There was a great rush for timber lands here and the people who lived in Oregon, most of them,



woke up about the time the timber was all gone, to the fact that they were valuable. After the lands practically were all taken, he did some reconnoitering around through various counties to see if there was any timber that might still be had. This was along from 1900 on. The timber excitement in Oregon started before 1900. He knows a great many people came here from Michigan and Minnesota as early as 1892, and took lands in the Santiam country. Large portions of these timber lands were acquired from the Government in 1900 and subsequently. He noticed the excitement with reference to filings in his Government work as early as 1892. Perhaps it was not so generally known then—it was more quiet. People who had come from timbered states, such as Minnesota and Michigan, were quietly taking up claims, and his connection with it was to the extent: these people who would locate on a township and where there would be three in a township, they would make application, and ordinarily the Department would order the township surveyed, so that in all these townships that they surveyed they would find three or four settlers, maybe half a dozen, who were acquiring timber claims under homesteads. There were no other persons in the township. It gradually increased until along in 1900. It was, he supposes, at its height along in there some place. Large bodies of these lands were acquired in 1900 and subsequently through Santa Fe and other scrips that were required to be filed on surveyed lands, although he

has no particular knowledge as to that. He did not have much to do with lands upon which scrip was placed. Scrip was either placed after the lands had been surveyed, or if it was scrip unsurveyed lands, they knew nothing about it. They would put the scrip on and would not ask to have it surveyed. That was principally Northern Pacific scrip. There was some 'additional' scrip. These photographs were all taken in the examinations of this land made while he was employed by the O. & C. Railroad Company and under the direction of the officers of that company."

The Defendants-Appellants called eleven witnesses who were at the time, or had been, employes of the Company, and had had experience in cruising a large proportion of the lands involved in this suit. (Vol. VI, pp. 2800-2908). These witnesses are unimpeached, they severally testified as to the particular lands cruised by them, the character of these lands in their original state, whether they were grazing, agricultural or timber, and the lands examined by these witnesses and about which they have testified, are classified in Defendants' Exhibits 342, 343, 344, 350, 351, 353, 354, 355, 356, 357, (Vol. XIV, pp. 7309-7346) to which the attention of the Court is drawn. Defendants' Exhibit 342 is a standard map showing in colors the lands examined, proved and reported upon by twelve of these cruisers who testified, and they testify with substantial unanimity, giving details and particulars

that the lands cruised by them are chiefly valuable for timber, and that the percentage that could be made agricultural, even by clearing, is small, and that in a state of nature the percentage that is agricultural, or fit for settlement, would be nominal. It is unnecessary to review this testimony in detail.

FREDERICK A. KRIBS, an experienced timber buyer and investor, testified in substance that the lands involved in suit were chiefly valuable for timber, and that he had been over and through a considerable portion of these lands, and that they were timber lands. He further testified (Vol. VI, p. 2913):

“Q. Suppose that a so-called actual settler should apply to purchase 160 acres from the company at \$2.50 an acre, and the Company should sell it to him in good faith, for the purpose of allowing him to make settlement on it, giving him a good title, and he was expected to go upon the land with his family, and fence it, and devote it to any useful purpose, such as grazing or agriculture, and make his living, confining his pasturage to that quarter section, what, in your judgment, would be his ability to make a living on any of these quarter sections in that way?

A. Well, over these mountains, on account of the bad weather and conditions generally speaking, I do not think he could make a living. I do not think he would stay there.

Q. Suppose that the company had adopted the



policy of selling all of these lands, timbered and otherwise, to actual settlers, in quantities not exceeding 160 acres, at a price not exceeding \$2.50 an acre, and had conveyed to these so-called actual settlers these timberlands with the understanding and expectation that they would go out on these timber-lands, attempt to make settlement, make a living, make a home, what use would these actual settlers make of these lands and what would become of the title?

A. Well, they would hold it until there was a good——

A. They would hold it according to their means, until there was a good market, and they would sell the timber to some lumberman or speculator, and it would all be owned by lumber companies now, or the most of it.

Q. What would be his ability, or what would be the possibility of a man being able to make a living as a settler on one of these quarter sections of timber-land?

A. Well, he might make some kind of a living, but it would be a very poor one, if he confined it strictly to one of these quarter sections high up in the mountains.

Q. Are these lands or not fit for actual settlement?

A. I would not say they were fit for settlement."

Referring to Defendants' Exhibit 259, which is a map purporting to show in colors the lands with-

in the limits of the two grants (Vol. XIII, p. 6698), he further testified:

“He is familiar with some lands, knows more about them than he does others, but in a general way he is familiar with nearly all of the lands that are colored on that map, ‘Defendants’ Exhibit 259’. There might be some to the extreme east side that he does not know much about, on account of their location being so far up streams, but generally speaking the greater part of these lands are valuable for standing timber and in many townships he has made personal examinations and estimates. The character of the timber in Douglas County on these lands, is fir, and in the higher mountains principally old yellow fir; in the lower altitudes, red fir with now and then a little cedar and other kinds of timber but it is principally fir timber. The topography of the country where these timber lands are situated, are rough and mountainous and the elevation runs from 1200 to 3000 feet but through the upper Umpqua he would think about 2200 feet would strike a general average. He thinks the lands owned by the Railroad Company in Coos County would be the lands that would be up on the Coquille waters. He has selected a large part of his Company’s lands on the head waters of the Coquille and these remaining lands he presumes are the ones that were not purchased. They are heavily timbered lands as a whole and their chief value is timber. He is acquainted with the timber lands of the Railroad Company in Curry County.

In Curry County, these lands are in Townships 34 and 35 south, ranges 11 and 12 and township 31 ranges 12 and 13. 31-12 would be in Coos County, 31-13 mostly in Curry County. They are principally heavy timbered lands. Township 35, ranges 11 and 12 must be these green lands shown on the map. They are on the Rogue River and there are a few lands that he cannot personally tell about. The topography of the country, of these lands in Curry County, is mountainous. He is acquainted in a few places in Josephine County but has not an active personal knowledge, as he has never done much work personally in that country. He has had men in different parts of the country and along back from the roads and mountains generally, a rough mountainous country, and the lands where there is timber, are valuable for timber. In other places, there would be old burns or openings. He has gone through there in a general way, but has not done a great deal of work in that country. The character of the topography is mountainous. There are some places where the soil would be fair in Josephine County in these timbered areas. Other places quite a bit of rock and more like a mining country. Up the Rogue River in Jackson County there is land known as the Hopkins Tract on Jenny Creek, he thinks that would be in the south side of the county. There is a tract known as the Good-fellow tract on the Upper Rogue on the east side which is fine sugar and yellow pine and the odd sections in through that end of the country are



also fine timber, and the land is chiefly valuable for timber. He has not been personally in the western part of Jackson County on the Applegate Creek. He had a man or two in there. Lands that are not covered with timber in Jackson County, but which are covered with chaparral, manzanita and other such like small growth, would have to be used for grazing land, something like that. The topography of these lands, both timber and otherwise, is all high elevation, mountainous. A man could have a tract of that and use it for summer grazing for cattle and sheep and so on. If a man was in the stock business for a living, and had 3000 or 4000 sheep, he ought to have about 14000 or 15000 acres of land, to graze them on. He does not know what the Forest Service figures this pasturage at, per acre, of these burned over and timbered lands to sheep men or other stock men per annum, but he rents land east of the mountains in the same localities and gets seven and a half cents an acre for them. They are able to graze these lands generally from April to in September. A man could not make a living at a rental of seven and a half cents an acre for 160 acres of this grazing land. It would not amount to anything. He spoke of some lands known as the Jenny Creek country but he could not say from memory whether that is located just in Jackson or Klamath County. It is a very high grade timber on that stream. Jenny Creek as shown on this map is in Jackson County. Most of these lands to which he refers are in Kla-

math and part in Jackson Counties. That is fine timber, some of the best in the State. These timber lands in Klamath County are chiefly valuable for the standing timber. He is not very much acquainted with the unsold lands of the company in Columbia County. He has been along some of the roads but has never been interested in the timber there. He has had men out in Tillamook County but has not been there personally. He optioned and spent a lot of money in examining two different tracts of land in Tillamook County. It was very heavy timber land but he did not buy it. These lands that he optioned would be in the edge of the grant, just outside the indemnity limits of the grant of July 25, 1866, and within the limits of the grant of May 4, 1870. These lands that he had under investigation were heavy timber, very rough and mountainous. He has no knowledge of the unsold lands of the company in Washington County. He is acquainted with the holdings of the Simpson Lumber Company to an extent, in Coos and Douglas Counties and is acquainted with the timber holdings of the C. A. Smith Lumber Company in Coos and Douglas Counties and has been over a great many of these lands personally and he thinks he is able to judge the timber character of a 40 when he sees it. There are two ways of ascertaining the timber stand on a given forty, with a view of buying or selling and that is what they call 'double running.' The land is all run out in its legal subdivisions by use of the

compass and is checked up on the different points to see that it is correct, then they make a tree count, or if the timber is standing pretty evenly all over the forty, measure half acres or acres here and there, strike a general average of what it is thought it will average per acre, right through and then multiply by the number of acres of timber, and have a scale measure on the stump and do the figuring from the scale. The location of the unsold timber lands in this grant in western Oregon and the even sections owned by different people are considered good and the timber belt is considered about the largest in the United States. The predominating commercial tree in that territory is Douglas Fir, which ranks as a tree that will make very good lumber. It is secondary in value to high grade pine but is considered very fine lumber. Referring to 'Defendants' Exhibit 315' witness says that he has been pretty much through all that country where these pictures were taken. He could not identify from the picture, the identical 40 acres of land that any particular picture was made from, but knows these pictures were all taken down in Mr. Smith's timber and he knows the man who took the pictures. He has two or three of these himself and these pictures fairly and correctly represent what they purport to show. Relatively speaking the timber lands of Coos County is a larger belt than in other localities and it is heavy in point of stumpage. It will average all about as well in quality.



Q. What is the highest price for which a quarter section of a large holding of timberlands has been sold within your knowledge and experience in this part of the State of Oregon, western Oregon, for instance?

A. Where I am posted, the last two or three years, there were quarter sections sold from \$4,000 up to \$12,000 per quarter. But before that it was some cheaper, as there was not a great deal of opposition in picking up timber then.

Whereupon witness testified they are asking for timber lands in the locality near Timber in Washington County in the Nehalem and Tillamook, since the railroad went in, from \$2.00 to \$3.00 per thousand for their stumpage, and there are quarter sections there that will go from ten million as high as twenty to twenty-one million to the quarter section. Some of these quarter sections could not probably be bought short of \$60,000.

Q. Well, then, if an actual settler under this law should apply to the company to buy one of these quarter sections at \$2.50 an acre, of which there are some 7,000 intervening in this case, actual or potential so-called settlers, his quarter section would cost him \$400. Would he or not be able to sell one of these quarter sections for the prices that you have named?

A. He would get a good fat price as soon as he would get his title."

This witness testified as to the pictures shown in Defendants' Exhibit 315 from personal knowledge of the location. He testified in substance and effect that the pictures were correct representations of what they purported to show. Defendants' Exhibit 315 is a copy of the "American Lumberman" of date November 11, 1911, C. A. Smith Lumber Company and others, Coos County, Oregon, and various photogravures illustrating saw-mill of C. A. Smith Lumber Company, Marshville, Oregon, growth of timbers in Curry and Coos Counties (Vol. VI, pp. 2925-2934 3076. These photogravures should be examined in connection with Vol. XVIII. They bring vividly to the attention of the Court the character of these lands.

W. R. WHIPPLE, of Josephine County, testified:

"Now, assuming that there is that number of acres of unsold railroad land in Josephine County, consisting of 167,480.98 acres, what is the fact as to whether or not there are any lands in that list, that lot, capable of actual settlement, upon which a home-builder could or could not make a living?

A. I doubt whether there is. There might be once in awhile a quarter section where they possibly could by working hard, but I don't know of any where they could make a comfortable living, with a reasonable amount of work.

Q. The land that is timbered, if cleared, what

would be the character of the soil as to the greater portion of the lands in that county?

A. It is nearly all poor, rocky, shaly soil.

Q. Would it or not be susceptible of agricultural use after it was cleared, even?

A. It would not." (Vol. VI, p. 2936 Transcript of Record)

ELMER S. SHANK testified:

"From his investigation and knowledge of others at Grants Pass engaged in the timber business, he would say that from eleven and twelve to sixteen per cent of the total unsold lands of the company in Josephine County would be chiefly or solely valuable for timber purposes. From his knowledge of the total area of these unsold lands of the company in Josephine County, he would say that between four and five per cent of them is capable of being put to agricultural purposes, but of this four to five per cent there is about three per cent that on account of being heavily timbered, uneven in character, or burnt-over land, would not be agricultural until the land was cleared, the expense of which would run from \$40 an acre to \$75 and \$100 per acre. He has had considerable experience in paying for clearing land of that kind. A settler generally tried to get as much cleared ground to start with as possible. That is the drawback against his country. The land costs so much to be cleared, and it is easier to sell at twice its intrinsic value, land that is cleared,



above that which is not cleared. There are two general divisions of soil in Josephine County, red soil and granite soil. The unsold railroad land is largely granite land or red land, of rather high elevation, meaning by high elevation from 1,600 feet upwards. Geographically speaking, that district is very old. It is of volcanic formation, and thrown in a great deal of confusion. The ranges are not long, but are broken—short, steep hills—and whenever the grade is about twenty per cent, it is very rocky. He would think that twenty or twenty-five per cent of this unsold land was quite rocky, but as to be totally unfit for cultivation, that it is a question almost impossible for him to answer. Not over two and one-half per cent would be available now for practical settlement. (Vol. VI, pp. 2960-2961 Transcript of Record)

\* \* \* He did not in his direct testimony estimate that 85% of these unsold lands were not good for timber, but that 15% had good timber, and that 4% was agricultural land.” (Vol. VI, p. 2966 Transcript of Record)

R. L. BOOTH testified:

“The township of railroad land east of him there is principally timber, saw timber, good timber, and he would say that that is the chief value of that land. The other railroad land there has dead fir timber on it, burned down many years ago. The snow fall in the high part of it is six feet in the winter. The burned over land is red

shot land. This burned over area was at one time covered over with heavy timber. There have been saw mills there. There has been scattered timber on the creek west and northwest; it is all dead, that is, practically speaking—just a few trees left. The burned over land is good enough soil. The timber is of no value at all. The stumps are still there pretty thick. It was good timber, some of it—very nice timber—large fir timber. The roots of these trees are still in the ground and sound. It would probably cost to clear timber land of that character from \$100 to \$125 an acre, and it could be cleared. It would cost that per acre to clear it, the best a man could do. The lowlands, where the hills are not so high, would be pretty good fruit land. On the ridges, where the ridge switches off, the land is pretty steep. He thinks that there would be about twenty-five per cent of this land that could be cultivated if it were cleared, and this is true of all of the even sections in that same territory. He was county commissioner eight and a half years. He would not to farm this land on the higher points, which is covered with five or six feet of snow. Crops would be late starting in the spring, and the weather would be cold early in the fall, and he does not think it would be practical to use for agricultural purposes.” (Vol. VI, pp. 2969-2970 Transcript of Record)

H. W. SCOTT testified:

“The character of the unsold land of the company involved in this suit situated in Washington County, is generally rough and broken, heavily timbered in a great many cases, and a great deal of the land is rocky and not fit for cultivation on that account. It is unfit for cultivation on account of being too rough, steep and broken. In a great many cases there is quite a high altitude, snow getting very deep in the winter. The soil is generally all coarse mountain land and very unproductive. In order to clear this land for cultivation it would require ordinarily from \$100 to \$200 an acre to put it in cultivation. \* \* \* Not over twenty per cent of these lands in the aggregate could be used in any way for agricultural purposes, even after the timber was cleared off, and he would not consider, in his judgment, that any of it would be available for any agricultural purposes without the removal of the timber. There might be an isolated case where somebody has gone on to a piece of land, cleared up a few acres and abandoned it. There are a few cases like that where they started out on it and could not make a living on it, referring to both the even and odd sections. He saw a great many places in the last two or three years where there were notices tacked up on trees notifying people that they had settled and located on a certain piece of railroad land and every case that he ever saw where these notices



were, was always where there was good timber.

\* \* \* He remembers one place on the South Trask, on the bottom, where it was settled up and houses were there, were settled twenty-five years ago and ten or fifteen years ago they were all abandoned, the houses going to rack and some of them had quite little clearings in there. They sold these lands. Some of these homestead entries within the limits of this grant with which he is familiar were abandoned before final proof, they were finally retaken. A great many of them were taken under the Timber and Stone Act and proved up under that act. The lands within the limits of these grants in Tillamook County is very rough and mountainous, steep and broken and rocky in a great many places, heavily timbered and chiefly valuable for its timber, the only value that he considers the land has now. It would cost to clear any of these lands that might have the soil that could be utilized for agricultural purposes \$100 to \$200 per acre. \* \* \*

Q. Well, isn't it true, Mr. Scott, that there here and there throughout this grant, in the low little valleys and ravines and draws leading down to the larger streams, there is here and there a spot where a house could be built, that is level, with a half-acre in a place, that you could get a garden, plant a few potatoes, sow a few oats, and make a pretense of a home, and settle on this land?

A. Yes, sir.

Q. Well, what would the balance of the settlement be good for?

A. It wouldn't be good for anything. A man would starve to death on a settlement like that.

Q. Well, where these quarters were timbered, and a man could find half an acre where he could built his cabin or his house, put out a garden of a half acre in potatoes, and things of that kind, couldn't he make a living by getting the timber?

A. Yes, if he could sell the timber for the price it is worth nowadays, he probably could live off the sale of the timber. He certainly wouldn't live off what he would produce from the soil anyway.

Q. Then such claims on such tracts, if I understand you, would be chiefly valuable for the timber?

A. Yes, sir." (Vol. VI, pp. 2975-2980 Transcript of Record)

J. D. ZURCHER testified:

Q. "Now assuming that this timber on certain parts of it stands upon soil that, when the timber was removed, it might have some agricultural value, or some value for grasses or fruit or grazing purposes, or other agricultural or horticultural uses, about what per cent could be made available for such agricultural or horticultural purposes when the timber was removed, in your judgment?

A. Oh, I should suppose it would average 15

or 20 per cent. (Vol. VI, p. 2997 Transcript of Record) Witness further testified "that he could not say exactly what it would cost to remove this timber and clear the stumps and roots and make it available for use in agricultural pursuits, but should estimate that it would run all the way from \$100 to \$300 or \$400 an acre to cut that timber off and clear it. \* \* \* He would say that about seventy per cent of the unsold land of the company in Douglas County was merchantable timber land, that would leave about thirty per cent of that land that would be practically worthless, the soil being rocky and unfit for cultivation of any kind. The country is all very rough. The Gardiner Mill Company he believes is the only company at the present time of those shown on the map that are manufacturing lumber out of their holdings in Douglas County. The Neenah-Oregon Land Company is a Wisconsin corporation and he thinks also the C. A. Smith Company. Kendall Brothers is a partnership, of Pittsburg, Pa., Pillsbury Lumber Company he presumes is a Minneapolis concern. The Lennan Land Company he thinks is an Oregon corporation with offices in Minneapolis. The Bradford-Culver Timber Company is a Wisconsin corporation. The Myrtle Lumber Company is an Oregon corporation, but the principal stockholders are the Lovejoys, who are eastern people. The Gardiner Mill Company is an Oregon corporation whose principal stockholders are California people. The Wey-



erhauser Land Company represents the Weyerhaeuser interests and everyone knows who they are, not a resident, but a foreign corporation. A. H. Hinkson lives at Eugene, Oregon. Sparrow, Coach & Kroll he believes is an eastern company. The C. A. Smith Company is not manufacturing any lumber from its Douglas County holdings, but it has holdings also in Coos County, and a mill at Marshfield. With the exception of the Gardiner Mill Company, none of these large holdings are being utilized for the manufacture of lumber or any other useful purpose. These timber lands of these various companies other than the Oregon and California Railroad Company, in his judgment, are the best timber lands in Douglas County. He is acquainted with the stumpage or number of thousand feet on a forty on some of these lands. Township 26 south, range 9 west, is very heavily timbered. The land in section 14, township 26 south, range 9 west, is owned by the C. A. Smith Company and will run 16,000,000 feet of timber to the 160 acres. West of the railroad in Douglas County in the Coast mountains, the land is reckoned among the best timber in the State of Oregon. On the east it is not so good. With the exception of the Gardiner Mill Company of which he can speak positively, and the exception of the Neenah-Oregon Land Company, all this timber was bought about five years ago by these companies, that of the Neenah-Oregon Land Company has been purchased within the last two years.

This map shows all the streams, all the roads, all the donation land claims taken up under the donation land law, the principal towns and postoffices in the county. It does not show the mountains but that is shown by the topography of the map.

\* \* \* \* The settlers referred to on this unsold railroad lands they called squatters who go out and build a little cabin, clear a little place for a little garden. Some of them would and some of them would not do that and start in to making posts, cutting and selling wood. In no case that he investigated had the so-called settler made any offer to the railroad company to purchase land. They were trespassers. In his experience these cases were few and were in Douglas and Jackson Counties. There had been a number of homestead entries relinquished and a timber and stone filing made on the land. As far as he knew, cabins and improvements of homestead entrymen on the even sections within the limits of the grant had all been abandoned as soon as title was perfected and the title passed to timber companies, especially in a certain section. These lands that were homesteaded and subsequently entered under the Timber and Stone Act in even sections, were all timber lands.

Q. Well, then, if I understand you, Mr. Zurcher, there are not very many settlers within the limits of this grant on the even sections, at the present time?

A. There are not. Take practically all this territory in through here (pointing to the southeast part of the map) and all you will find is an occasional bachelor's cabin. Once in a while you will find a man with a family on a little creek. You won't find any farming country in there at all. \* \* \* \* "

Witness further testified: "That his knowledge concerning the homestead, timber and stone and other public land entries on the even sections within the limits of this grant in Douglas County, was obtained from the Land Office Records as to what the notices are, and from traveling through the country all over Douglas County. He found that in the even sections, which were the only sections that could be entered, he would find a timber claim entered and a homestead entered, for instance one would go out and take up a homestead, live on it there until he would commute it and either hold it for investment or sell it to some timber company. The lands obtained through a majority of these entries have been sold to timber holding companies. This country is all rough, broken land, heavily timbered." (Vol. VI, pp. 2997-3006 Transcript of Record.)

C. H. STEWART testified: "That part of these lands that are covered with timber would be so expensive to clear that it would be almost prohibitive. He would say that it would cost from \$150



to \$200 an acre to clear. The chief element of value of these timber lands would be the timber. (Vol. VI, p. 3009 Transcript of Record) \* \* \* He knows of quite a number of homestead entrymen, who as soon as they secured their title from the government, sold it, to some of these eastern land syndicates. These homesteads were on the even sections and were about of the same character as the lands that he has been describing. They were timber lands, that is, the value was in the timber and not in the land." (Vol. VI, p. 3014 Transcript of Record)

W. H. FALLIN testified: "During his time of office as assessor he had absolute charge of the classifying and cruising of all the lands in Josephine County, railroad, government and all of it. As assessor he had been on the land a good deal, and really knows about the lands. He never cruised any and don't know anything about cruising. The unsold lands of the Oregon and California Railroad Company is mountainous, part of it is timber land and part of it is barren. It is bald hills considerable of it; he really did not cruise it, there wasn't enough timber on it to cruise it. \* \* \* This barren land that is free from timber is rough, rocky and barren granite, with some grass growing on it. He would think there was not over five per cent of this unsold land in Josephine County that would be suitable for agricultural or horticultural purposes, that one could use at all. Wherever there

is a stream or creek, there is probably a little bit of bottom land there, that might be used for agricultural purposes. \* \* \* A very small per cent of the lands that are covered with timber, where timber is the chief value, could be utilized for agricultural purposes after the timber is removed, he would say that it was not over five per cent, that would be putting it pretty strong. \* \* \*

Q. Suppose that an actual settler, so-called, should apply to the company under the Act of April 10, 1869, to buy at the rate of not to exceed \$2.50 an acre, a tract of this land not exceeding 160 acres, and the company should sell it to him, and there was no other land there over which he could roam his stock outside of his 160 acres, what would be his ability to make a home of his 160 acres, and support himself, or himself and family if he had one, in your judgment?

A. I do not think he could make a living on it. In fact, they don't live there. There is many a township where there is not a settler living there.

Q. Why wouldn't he be able to make a living, as an actual settler, for himself and his family?

A. The ground wouldn't be productive enough. He couldn't raise anything. And he couldn't graze enough cattle on 160 acres, there wouldn't be enough sustenance for them to live on.

Q. Something has been said in the record in this case about clearing off some of this land by grubbing it, burning the timber stumps, and then seeding it to grass. I wish you would state, in your

own way, whether or not any of this land is available for such use, and whether it would be at all practicable for this so-called settler to make a living that way on 160 acres.

A. There are thousands of acres in that country without any timber at all. They had bald hills—there is no grass there only for a short time.

Q. Couldn't man have some of this land cleared, and take 160 acres of it, after the timber was cut down, seed it to grass or some kind of forage, and make a living by raising stock on the 160 acres?

A. Well, he might, but I don't believe but a little of it. Of course, he might pick out a piece once in a while that you could do that.

Q. Do you know of any instance in that county where any other party is attempting to make a living in this way on this land, as grazing land, limiting it to 160 acres?

A. No, not in those outside districts." (Vol. VI, pp. 3015-3019 Transcript of Record)

IRVINE P. GARDNER testified:

"That these unsold lands are chiefly valuable for their timber. In the present condition, at this time, a great deal less than one per cent of this total area, in his judgment, would be available for horticultural or agricultural purposes. Twenty-five to thirty per cent could be farmed after the timber is removed. He has a homestead of his own, and what clearing he has done has cost him from \$100 to \$200 per acre, and he has cleared a great deal of land, and helped clear land in camps.



Q. From your knowledge of the timber that is on this land, that you say might be utilized for some agricultural or horticultural purposes after the timber was cleared, what would you say the average cost per acre would be to clear such land and make it available for use? Go ahead and answer.

A. After the timber is cut, or before, at the present time—take it in its present state?

Q. Take it as it is.

A. Taking it in its present state, the average cost would be from \$75 to \$100 per acre to clear.

Q. Do you say, or do you think that you could clear some of this land that runs 6,000,000 feet board measure to a quarter section, at the rate of \$100 an acre?

A. Why, it would have to be done in a commercial way, with donkey engine and derrick, certain people are contracting to. It costs from \$10 to \$25 an acre to slash, and it will take on your trees anywhere from two to ten sticks of powder per stump. I never figured it out that way, but it would take—some of it could be done. It would probably average nearer \$150 than \$100 to clear it free of stumps.

Q. What is the fact, if you know, as to the presence of the roots in the ground of these trees, after the stumps are blown out by powder?

A. Well, if they blow the stumps out, the roots will bother if not pulled up, for a few years. \* \* \*  
Ninety-five per cent of the even sections, within the

limits of this grant and adjacent to the railroad lands, is covered with merchantable timber. From his experience in the abstract office and looking up titles, checking blue prints, etc., he knows that the title to the even sections, where the title has been disposed of, has passed into the hands of timber companies, a good deal of it. It was originally entered under the Timber and Stone Act, the Homestead and Commutation or Cash Entry Act, and Scrip. A great deal of it has been taken under the act of July 30, 1898, and the acts of 1902 and 1903. The Act of July 30, 1898, is the act of Northern Pacific scrip, individual claimant scrip. The Neenah-Oregon Land Company has bought probably thirty homesteads, which it will be glad to lease for taxes, and cannot lease one. \* \* \* Very little of this land is capable of being used for agricultural purposes. \* \* \* Looking over the country generally, his blue prints and in the abstract office, probably in that territory 500 people obtained that land under Homestead or the Commutation Act. The rest was taken under the Timber and Stone Act. He is not stating anything but what he has examined himself personally, through cruising. A great many of their cabins have been burned, and a great many have been abandoned. Some few of them, the patches that they have are being used by cattlemen and others, who keep up the fences.

Q. What I am getting at is, the entryman that settled the land, what has become of him in nine cases out of ten, if you know?

A. Sold out and out of the country, most of them. A majority of this land in our part of Douglas County was settled in 1902 and '3, and 1901, a great deal of it by people who came from Michigan, Wisconsin and Minnesota, and took up land.

Q. Now in the main, to whom were these homestead claims or homesteads transferred,—to what class of purchasers, from your knowledge, if you know?

A. Timber companies. (Vol. VI, pp. 3029-3033 Transcript of Record) \* \* \* Less than one per cent of these lands are agricultural in character, in Douglas County, in his opinion, until the timber is removed." (Vol. VI, p. 3035 Transcript of Record)

WILLIS VIDITO testified:

"The chief value of these unsold lands in Benton County would be timber, nearly the total value.

\* \* \*

Q. Now, suppose that an actual settler, under this so-called claim of the government that the company is under obligation to sell to actual settlers at the rate of not to exceed \$2.50 an acre, and in quantities not exceeding 160 acres, should take a quarter section, or apply for it, and the company should let them have a quarter section of this burned over land upon which to settle and make a home, how would that man make a living on that piece of land?



A. There is none in township 6, 7, nor 8 west, and 13 south, 6, 7 nor 8 west, in 14 south, that anybody could make a living on, either government land or railroad land.

Q. Why?

A. Well, it isn't of a nature that they could do anything with that quantity of. I took a claim in 1872, and I couldn't make a living on that, and it was the best, I think, that was available at that time, nearly forty years ago. \* \* \*

Q. I mean, suppose a settler would go in there and buy 160 acres, take a homestead of 160 acres, expecting to make it his home, and be confined to that piece of land to make his living, either by pasturing stock, or any useful avocation, relating to agriculture or horticulture, how would he get along?

A. He would be caught.

Q. He wouldn't, then, be able to make a living on the piece at all?

A. No, he couldn't make a living for a family on a piece of land, unless he had money to squander and live on it.

Q. I mean out of the land?

A. No, he couldn't make it out of the land. I never have advised anybody, in years past, not in the last ten or fifteen years, to ever take a homestead. I knew where there was vacant government, but I couldn't recommend anybody to take it.

"That he knows of part of the even sections within the limits of this grant, where the land

is chiefly valuable for timber, which had been taken under the Timber and Stone Act, and thinks that most of it was taken for this cascara bark, and after they peeled the bark off they threw the claim up, and all that government land was filed on along the line between Lincoln and Benton, about eight or nine years ago, and he does not think that there is any one of them living on those claims today. They were just simply vacated. He thinks only one man perfected his title. There is no one living on these homesteads taken in the last twelve or fifteen years. The homesteads were sold to timber syndicates." (Vol. VI, pp. 3060-3065 Transcript of Record)

DENNIS McCARTHY testified:

"The bulk of the holdings of the C. A. Smith Lumber Company is in the southwestern part of the county and he thinks this company owns about 70,000 acres in Coos County. Some of these lands are within the limits of the Oregon and California Railroad Company. The Simpson Lumber Company owns in Coos County about 24,000 acres. The Menasha Woodenware Company, of Menasha, Wisconsin, owns a large tract of timber formerly owned about 20,000 acres and has recently purchased another large tract there of about 70,000 acres, and it has pretty close to 100,000 acres there all together. These timber lands of that company are mostly all mountain lands, principally fir timber which is the principal tree in Coos County and western

Douglas County, with a little scattering hemlock and cedar. Weyerhauser Timber Company is the next largest owner of timber lands in Coos County, owns about 25,000 acres in that county. He does not know the extent of its holdings in Douglas County. It has a large tract there. The holdings of the Weyerhauser Timber Company in Coos County are all heavily timbered land. He has cruised part of the unsold lands of the Oregon and California Railroad Company in Coos County. He thinks they have cruised about 60,000 acres of them up to this time. His knowledge of the balance of these lands is just a general knowledge. He has been through the townships in which they are situated but has not cruised these townships yet. He has been sufficiently over them to be able to state, in a general way, the general character of the rest of these lands. So far as he has been through the unsold lands of the Oregon and California Railroad Company in Coos County, they are mostly high lands, heavily timbered lands, as far as he has seen them and he has actually cruised about 60,000 acres of them and these were all heavily timbered lands, and as to these that he has not specifically cruised but traveled through or over, they were chiefly timber and most high and all high mountain land. These unsold lands are nearly all steep mountain slopes, gulches and generally rough country. In their present state, he would not consider, that any of it would be available for agricultural or horticultural purposes and it



is so heavily timbered that it would not be practical to clear the timber and cultivate it. It would not pay, he thinks, any part of it, to clear the heavy timber off of it and cultivate it and their chief value is timber. . . .

Q. Suppose that a settler would come to the company and say, "Here, I want to pay not to exceed \$2.50 an acre for 160 acres of that land out there, and I want to make a home on it—I want to settle on it," and the company should sell it to him, from your knowledge of this grant, I wish you would state to the court whether or not such settler would be able, confining himself to the particular quarter section, however he might select it, to support himself and his family, make settlement there, by any means, either for grazing what few stock he might have on it, or devoting it to agricultural or horticultural or any other useful purpose?

Q. You may answer.

A. I don't know of any that would be available or practicable for a settler to go on and make a living.

Witness testified that there is very little settlement on the even sections within the limits of the grant in Coos County. There is scarcely any settlement on the lands. There is very little evidence of any settlement. Most of that land has been taken under the timber and stone act with scrip. The title, after it passed to the entryman, has most

all passed into the hands of some of the large timber holders. These even sections that have been thus entered are all heavily timbered lands. . . . Most of these even sections within the limits of this grant in Coos County have nearly all been taken under some law of the United States, mostly under the timber and stone act and when the entry was completed and title vested in the entrymen the lands have all passed substantially to timber investors. . . . The land's chief value, as far as he has seen, in Curry County was for timber. He could not see any that was available for agricultural purposes. He has been cruising for Coos County four years to arrive at the valuation of the lands for assessment purposes, to classify and value the lands as for assessment purposes."

(Vol. VI, pp. 3071-3076 Transcript of Record.)

## ASSIGNMENT OF ERRORS

OF THE OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, (Vol. XV, pp. 8222-8267, 8138-8183, 8077-8122).

Each of said Defendants-Appellants respectively made and filed Assignment of Errors in identical words, the material portions whereof each now relies upon as next hereinbelow.

"1.—The Court erred in holding that the United States, complainant herein, was entitled to the relief prayed for in its complaint herein, or to any relief, and in not holding that the

said complaint of said complainant should be dismissed.

2.—The Court erred in holding that the complainant had any right, title or interest in or to the lands described in the decree herein, or any part thereof.

3.—The Court erred in holding that the complainant is the owner in fee simple, or in the possession of said lands, or any part thereof, or entitled to the possession of the same, or any part thereof.

4.—The Court erred in holding that the defendant, the Oregon and California Railroad Company, was not the owner in fee simple and in the possession, and entitled to the possession of said lands, and the whole thereof.

5.—The Court erred in holding that the allegations in said bill of complaint were sustained by the evidence, and in not holding that said bill should be dismissed.

6.—The Court erred in holding that the lands or any thereof, described in the decree, were and had been forfeited to the complainant, and that a decree be entered forfeiting said lands, or any thereof, to the complainant.

7.—The Court erred in holding that the lands and estates in lands in the said decree described, either in whole or in part, have become or now are forfeited to, or that the title to the same or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof now are the absolute property of the United States of America, or are free from any or all claim or claims of right, title



or interest or lien in, to, or upon the same or any part thereof by or in favor of this defendant, individually or as trustee, or the defendant Oregon and California Railroad Company, or the defendant Southern Pacific Company, or the defendant Stephen T. Gage, individually or as trustee, or any party or parties claiming under them, or either or any of them.

8.—The Court erred in holding that the title of complainant to the said lands, or any thereof, should be quieted.

9.—The Court erred in holding that the title of the United States of America to all or any of said lands or estates in lands be or is by said decree quieted or confirmed, or be or is so quieted or confirmed, particularly as to any or all claim or claims of right, title, interest or lien in, to, or upon the same, or any part thereof, by or in favor of this defendant, individually or as trustee, or the said Oregon and California Railroad Company, or the said Southern Pacific Company, or the said Stephen T. Gage, individually or as trustee, or each or every party or parties claiming under them, or either or any of them.

10.—The Court erred in holding that complainant was entitled to recover its costs and disbursements herein, and that a decree should be entered to that effect.

11.—The Court erred in holding that the complainant herein was or is entitled to any injunction or restraining order in this cause.

12.—The Court erred in holding that this defendant, individually or as trustee, or said Oregon and California Railroad Company, or

said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or the officers or agents of them, or any or either of them, be, or that they, or any or either of them by said decree are or is forever, or at all, enjoined or restrained from claiming or asserting, or from claiming or asserting in any manner any right, title, interest or lien in, to, or upon the said lands, or estates in lands, or any part thereof, or from in any manner selling, conveying, leasing or disposing of any of said lands or estates in lands, or any interest therein, or from negotiating, executing, or recording any document or instrument, or from doing any other act or thing which shall in any manner affect or encumber the title to said lands or estates in lands or any part thereof, or from going upon said lands, or any part thereof, or from cutting, removing or in any manner using or injuring any timber or other natural products thereof, or from committing in any manner trespass upon said lands, or any part thereof, or from using or interfering with in any manner said lands or estates in lands, or any part thereof, or the title or possession thereof, or from contracting with, inviting or inducing, or permitting, or in any manner whatsoever permitting others, or any party to do any of the things aforesaid.

13.—The Court erred in holding as to all or any lands which may hereafter revert, as in paragraph IV of said decree set forth, to this defendant, individually or as trustee, or to said Oregon and California Railroad Company, or

to said Southern Pacific Company, or to said Stephen T. Gage, individually or as trustee, that this defendant, or the said Oregon and California Railroad Company, or the said Stephen T. Gage, or any or either of them, shall within sixty days, or any other period of time, from the date that any of said lands shall so revert to said defendants, or any or either of them, or at all, execute or file with the clerk of said court, or otherwise, or at all, any deed of conveyance in due or legal form, or at all, conveying or confirming unto the United States of America all or any of said lands, free from any or all claim or claims of right, title, interest or lien in, to, or upon the same, or any part thereof, in favor of said defendants, or either or any of them, or otherwise or at all, or that in the event that said defendants, or any or either of them, shall fail to execute or file any such deed or deeds of conveyance, said decree shall operate or shall have the same force or effect as such deed or deeds of conveyance.

14.—The Court erred in holding that within sixty days or any other time, from the date of said decree, or otherwise or at all, this defendant, or said Oregon and California Railroad Company, or said Stephen T. Gage, or any or either of them, shall execute or deliver to the clerk of said court, or otherwise, or at all, a deed of conveyance in due or legal form, or at all, conveying and confirming unto the United States of America, all or any of said lands situated in the State of Washington, free or clear from any or all claim or claims of



right, title, interest or lien in, to, or upon the same, or any part thereof, in favor of said defendants, or any or either of them, or otherwise, or at all, or that in the event that said defendants, or any or either of them, shall fail to execute or file any such deed of conveyance, said decree shall operate or shall have the same force or effect as such deed of conveyance.

15.—The Court erred in holding that the above mentioned defendant, Union Trust Company, has no lien on said lands or any part thereof, and in holding that the lien of said defendant evidenced by deed of trust of date July 1, 1887, was of no avail and without force or effect and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled.

16.—The Court erred in holding that the above mentioned defendant, Stephen T. Gage, as trustee, or the said Southern Pacific Company, had no lien on said lands or any part thereof, and in holding that the lien of said defendant, Stephen T. Gage, as trustee, evidenced by deed of trust of date June 2, 1881, was of no avail and without force or effect and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled.

17.—The Court erred in holding that this defendant, as trustee for the owners and holders of bonds issued under and by virtue of trust mortgage of July 1, 1887, was not en-

titled to the rights, or to all or any of the rights of an innocent purchaser for value.

18.—The Court erred in holding that whatever interpretation might be given to the proviso touching actual settlers of said act of April 10, 1869, or whether the same created a condition subsequent or not, this defendant, Union Trust Company, of New York, was not entitled to a lien upon the right of way and the whole land grant of the said act of July 25, 1866, as security for the sum of twenty million dollars, as provided in said mortgage of July 1, 1887, and in holding that this defendant was not entitled to have said lien impressed upon said right of way and said entire land grant to be satisfied first and before forfeiture or reversion to the complainant, or said United States of America, if forfeiture or reversion should be decreed.

19.—The Court erred in holding that the right to forfeiture for breach of condition subsequent is not a right that may be waived, and in holding that in this case, as to this defendant, said right, if it ever existed, was not waived by said complainant and said United States of America, and in holding that said complainant and said United States of America is not estopped to allege a breach of such condition or to pray or have forfeiture as against this defendant.

20.—The Court erred in holding that the paramount and primary purpose of Congress touching the land grant under the act of Congress of July 25, 1866, mentioned in the bill of complaint and entitled "An act granting

lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," or any amendment thereof, is expressed by the proviso as to sale to actual settlers, contained in the act of Congress of April 10, 1869, referred to in said bill, and entitled "An act to amend an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon'."

21.—The Court erred in holding that the paramount and primary purpose in making the said land grant was other than to aid in the construction of a railroad, as expressed in the said act of July 25, 1866.

22.—The Court erred in holding that the paramount and primary purpose of Congress touching the land grant under the act of Congress of May 4, 1870, mentioned in the bill of complaint, and entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," was other than to aid in the construction of a railroad as expressed in said last mentioned act.

23.—The Court erred in holding that this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had at any time violated any provision of said act of July 25, 1866, or of said act of April 10, 1869, or of said act



of May 4, 1870, or more particularly any clause or provision either in said act of April 10, 1869, or in said act of May 4, 1870, relative to actual settlers.

24.—The Court erred in holding that in respect to the said land grants, or either of them, there had been any application thereof by the grantees of the same, or either of them, or their successors in interest, or by this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, other than in fulfillment of and compliance with the paramount and primary purpose of Congress in making the said land grants, or either of them.

25.—The Court erred in holding that the application of the land grant under the said act of July 25, 1866, denominated by way of distinction the East Side Grant, to the construction of the railroad contemplated therein, by way of a mortgage or deed of trust of said land grant to raise funds, or refund the same, for the construction of such railroad, was a violation of any congressional intent or legislation in the premises, or other than a fulfillment of and compliance with the intent and legislation of Congress.

26.—The Court erred in holding that the application of the said East Side Grant to the construction of the railroad contemplated in said act of July 25, 1866, by way of a deed of trust or mortgage of said land grants to raise funds or to refund the same, for the con-

struction of such railroad, was in subjection and subordination to, and restricted by, the proviso in said act of April 10, 1869, relative to actual settlers.

27.—The Court erred in holding that any sale or sales of lands forming part of said East Side Grant, pursuant to the mortgage or mortgages, deed, or deeds of trust of said grant for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness, so secured or refunded, constituted any departure from or violation of any purpose, or enactment of Congress in the premises, or were other than a fulfillment of and compliance with, the policy, intent and legislation of Congress.

28.—The Court erred in holding that the lands of said East Side Grant, or any part thereof, had been sold in breach or violation of any provision of the said act of July 25, 1866, or of said act of April 10, 1869.

29.—The Court erred in holding that the grantee of said East Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt, or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same or any part thereof, in breach of any act of Congress or otherwise than in the fulfillment of and com-

pliance with the policy, intent and legislation of Congress in the premises.

30.—The Court erred in holding that the application of the land grant under the said act of May 4, 1870, denominated by way of distinction, the West Side Grant, to the construction of the railroad therein contemplated, by way of a mortgage or deed of trust of said grant to raise funds, or to refund the same, for the construction of such railroad was in breach of any provision of said last mentioned act, or in violation of any congressional intent or legislation in the premises, or other than a fulfillment of and compliance with the intent and legislation of Congress.

31.—The Court erred in holding that the application of the said West Side Grant to the construction of the railroad contemplated in said act of May 4, 1870, by way of a mortgage or deed of trust of said grant to raise funds, or refund the same, for the construction of such railroad, was in subjection and subordination to and restricted by anything in said last mentioned act as to actual settlement.

32.—The Court erred in holding that any sale or sales of lands forming part of said West Side Grant, under any mortgage or deed of trust of said grant, for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constituted any departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment



of and compliance with the policy, intent and legislation of Congress.

33.—The Court erred in holding that the lands of said West Side Grant, or any part thereof, had been sold in breach of any provision of the said act of May 4, 1870.

34.—The Court erred in holding that the grantee of said West Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt, or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same or any part thereof, in breach of said act of May 4, 1870, or otherwise than in fulfillment of and compliance with the policy intent and legislation of Congress, in the premises.

35.—The Court erred in not holding that the proviso in the Act of Congress of April 10, 1869, to-wit, 'That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents (\$2.50) per acre,' is void for uncertainty.

36.—The Court erred in not holding that the said proviso is a purely directive, regulative covenant.

37.—The Court erred in not holding that the said proviso is unenforceable by the United States, because its interest is purely nominal.

38.—The Court erred in not holding that

the said granted lands, East Side and West Side, both or either, are timbered in character and were and are not capable of actual settlement.

39.—The Court erred in holding that the provision in said act of July 25, as to the filing of assent had not been done away with by the act of Congress of June 25, 1868, mentioned in the bill of complaint and entitled, "An act to amend an act, entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon'."

40.—The Court erred in holding that the provision in said act of July 25, 1866, as to the filing of assent had not been waived by said act of June 25, 1868.

41.—The Court erred in holding that said provision as to the filing of assent had not been repealed by said act of June 25, 1868.

42.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868.

43.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868, in connection with the designation of the Oregon Central (East Side) Railroad Company, by the legislature of Oregon, on October 20, 1868.

44.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868, in connection with the construc-

tion work, previous thereto, of the Oregon Central (East Side) Railroad Company, and with the subsequent designation of said last named company by the legislature of Oregon, on October 20, 1868.

45.—The Court erred in holding that said provision as to the filing of assent attached itself to any right, title or interest of the grantee of said East Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, by or through any estoppel, consent, legislative obligation, covenant, condition or otherwise, because of the action of said East Side Company in filing written assent on June 30, 1869, or at any other time, or in taking any step or steps to bring the attention of Congress to the matter of such assent, or to procure any action by Congress in that behalf, if any such step or steps were taken, or in applying to Congress, if such application there was, for leave to file such assent, or otherwise, or at all.

46.—The Court erred in holding that said provision as to the filing of assent in respect to said East Side Grant, was a condition, either precedent or subsequent.

47.—The Court erred in holding that the proviso in respect to settlers in said act of April 10, 1869, was a question in the case requiring judicial determination.

48.—The Court erred in holding that any imposition by Congress under said proviso of



any qualification, restriction, limitation, or burden upon the estate granted under said act of July 25, 1866, was within the power of Congress to enact, or other than a nullity.

49.—The Court erred in holding that any imposition by Congress under said proviso, of any qualification, restriction, limitation or burden upon the estate granted under said act of July 25, 1866, was within the power of Congress to enact, or other than a nullity, regard being had to the rights of the California and Oregon Railroad Company, a California corporation, under said act of July 25, 1866, and to the vested interests, accruing under said act to said last named corporation in virtue of its acceptance of said act, and its conduct, construction and expenditures thereunder and pursuant thereto.

50.—The Court erred in not holding that the act of Congress of July 25, 1866, pleaded in the bill of complaint in this cause, was and is a single grant, of the lands described therein, to the California and Oregon Railroad Company organized under the laws of California and to such company organized under the laws of Oregon as the legislature of the latter state should thereafter designate for the purpose of aiding the said companies in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon.

51.—The Court erred in not holding that the said grant under said act of Congress was entire and not severable; and upon the filing of assent to said act in the Department of

the Interior by either of said companies within one year after the passage thereof and the completion of the first section of twenty miles of said railroad and telegraph line within two years after the passage thereof, the said act became operative and vested in the company complying therewith an interest in the entire grant.

52.—The Court erred in not holding that the California and Oregon Railroad Company filed its assent to said Act in the Department of the Interior within one year after the passage thereof and completed the first section of twenty miles of said railroad and telegraph line within two years after the passage thereof, and that thereupon said act became operative and vested in said California and Oregon Railroad Company an interest in the entire grant.

53.—The Court erred in not holding that when the California and Oregon Railroad Company filed its assent to said Act of Congress of July 25, 1866, in the Department of the Interior within one year, and completed the first section of twenty miles of said railroad and telegraph line, within two years after the passage of the said act, Congress was without lawful authority to annex a new condition, by amendment or otherwise, to the land-grants.

54.—The Court erred in not holding that had the legislature of Oregon failed to designate a company to construct said railroad and telegraph line in Oregon, the California and Oregon Railroad Company, upon compliance with the provisions of said act of July 25, 1866, had the right and it was authorized by said act to

construct the entire railroad and telegraph line from the Central Pacific in California to Portland in Oregon and thereby earn, and become entitled to, the entire land grant under said act.

55.—The Court erred in not holding that the said act of Congress of July 25, 1866, authorized the California and Oregon Railroad Company to construct any part or all of the said railroad and telegraph line provided the legislature of Oregon failed to designate a company as provided by said act, or such company failed to file its assent to said act.

56.—The Court erred in not holding that the said act of Congress of July 25, 1866, was, as to said California and Oregon Railroad Company, a grant in presenti, of the odd-sections of lands within the limits therein specified, along the line of said railroad from the Central Pacific Railroad in California to Portland in Oregon.

57.—The Court erred in not holding that at the time of the passage of the act of Congress of April 10, 1869, pleaded in the bill of complaint herein, the California and Oregon Railroad Company had fully complied with all of the terms of said act of July 25, 1866, as amended by the act of June 25, 1868, which were required to be performed up to the time of the passage of said act of April 10, 1869.

58.—The Court erred in not holding that prior to the passage of said act of April 10, 1869, pleaded in the bill of complaint herein, the California and Oregon Railroad Company had acquired a vested interest in the whole of the lands granted by said act of July 25, 1866, and



the said act of April 10, 1869, annexing a condition to the entire grant was void.

59.—The Court erred in not holding that the said grant under the said act of Congress of July 25, 1866, being single and entire and said act of April 10, 1869, being void as to the California and Oregon Railroad Company, as to the whole of said grant, it is void as to the portion of said grant situated in the State of Oregon.

60.—The Court erred in not holding that the said act of Congress of April 10, 1869, was void in that it requires that the interest acquired by the California and Oregon Railroad Company in the lands granted by said act of July 25, 1866, shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and at a price not exceeding two dollars and fifty cents (\$2.50) per acre, as a condition of an extension of time to the company designated by the legislature of Oregon, to file its assent to said act of July 25, 1866.

61.—The Court erred in not holding that the said act of Congress of July 25, 1866, did not require that both of the companies mentioned therein should file assent to said act or construct said railroad and telegraph line, but said act was satisfied and became operative if either of the said companies filed its assent in the Department of the Interior within one year, after the passage of said act, and completed construction of its said railroad and telegraph line within the time provided in said act and the act of June 25, 1868, amendatory thereof.

62.—The Court erred in not holding that after performance by the said California and

Oregon Railroad Company, of all conditions imposed by the act of July 25, 1866, and the same as amended by the act of June 25, 1868, required to be performed prior to April 10, 1869, it acquired and possessed a vested right in the whole of said land grant and Congress was thereby deprived of the power and was without authority to 'add, to, alter, amend or repeal' the said act of July 25, 1866, in any way that would tend to embarrass, delay or defeat the construction of either or any portion of said railroad and telegraph line, or in any way that would tend to interfere with any vested rights in said grant.

63.—The Court erred in holding that the said proviso in respect to settlers in said act of April 10, 1869, was a condition precedent.

64.—The Court erred in holding that the said proviso in said act of April 10, 1869, was a condition subsequent.

65.—The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of said proviso.

66.—The Court erred in holding that any provision in said act of May 4, 1870, touching sales to actual settlers, was a condition precedent.

67.—The Court erred in holding that any provision in said act of May 4, 1870, touching sales to actual settlers, was a condition subsequent.

68.—The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such

there be, of any provision in said act of May 4, 1870, touching sales to actual settlers.

69.—The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect either to said East Side grant, or to said West Side grant, or any part thereof.

70.—The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect to either of said grants, in any re-entry for breach of condition, or legislative equivalent thereof, or in any legislative declaration of forfeiture.

71.—The Court erred in holding that there was jurisdiction in the Court on the equity side of the cause or subject matter of this suit, and in not dismissing the bill of complaint.

72.—The Court erred in holding that there was jurisdiction in the court on the equity side to enforce a forfeiture of said East Side grant for the breach of an assumed condition subsequent, if such breach there was, in said proviso of said act of April 10, 1869.

73.—The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture for the breach of an assumed condition subsequent, if such breach there was, in any provision of said act of May 4, 1870.

74.—The Court erred in holding that the complainant was entitled to a decree quieting its title to either of said grants against this defendant, individually or as trustee, said Oregon and California Railroad Company, said Southern Pacific Company, and said Stephen T. Gage.



individually or as trustee, or any or either of them, or any party to the cause.

75.—The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company, or its grantees, if such there were, did not have the legal title to such grants.

76.—The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company, or its grantees, if such there were, did not have the possession of the same.

77.—The Court erred in holding, as foundation for a suit by complainant to quiet its title to the said grants, or either of them, or any part thereof, that the same had not been reduced to possession and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

78.—The Court erred in holding that at the time of the filing of the bill of complaint herein and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company, or its grantees, if such there were, did not have possession of the said grants, or either of them.

79.—The Court erred in not holding that at the time of the filing of the bill of complaint herein, and ever since, and for a long time con-

tinuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all the lands of which forfeiture is sought by said bill of complaint against this defendant, individually and as trustee, and said Oregon and California Railroad Company and said Southern Pacific Company and against said Stephen T. Gage, individually and as trustee.

80.—The Court erred in holding that the said proviso of said act of April 10, 1869, or any provision of said act of May 4, 1870, touching actual settlers in anywise or at all affected the title to the lands, or any part thereof, either of said East Side grant or of said West Side grant.

81.—The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been waived by Congress and complainant.

82.—The Court erred in holding, on the assumption of a condition subsequent, in any provision of said act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to the said West Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been waived by Congress and complainant.

83.—The Court erred in holding, on the assumption of a condition subsequent, in respect

to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture, had not been acquiesced in by Congress and complainant.

84.—The Court erred in holding, on the assumption of a condition subsequent in any provision of said act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been acquiesced in by Congress and complainant.

85.—The Court erred in holding on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to the said East Side grant, that as to any breach of such assumed condition subsequent, or assumed cause of forfeiture, the complainant herein was not estopped to assert the same.

86.—The Court erred in holding, on the assumption of a condition subsequent, in any provision of said act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side grant, that as to any breach of such assumed condition subsequent, or any assumed cause of forfeiture, the complainant herein was not estopped to assert the same.

87.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act



of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acquiescence in the many deeds of conveyance made by the defendant, Oregon and California Railroad Company, with the knowledge of Congress and complainant.

88.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acceptance and use of the said railroad.

89.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by annual issuance of patents to said lands from 1871 down to 1906.

90.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by the passage by Congress of the Forfeiture Acts of January 31, 1885, and September 29, 1890.

91.—The Court erred in not holding that this suit as to all lands patented prior to October, 1902, was and is barred by the Acts of Congress of March 3, 1891, and March 2, 1896.

92.—The Court erred in not holding that all causes of action presented by the bill of com-

plaint herein are barred by laches and the Statute of Limitations.

93.—The Court erred in holding that the primary and controlling purpose of Congress in the act of July 25, 1866, and acts amendatory thereof, was to provide for the sale of the granted land to actual settlers, or in that behalf, that said lands were capable of actual settlement.

94.—The Court erred in not holding that the primary object of the act of April 10, 1869, was to extend the time for the construction of the said railroad and not to impose a condition or trust upon the grant already made.

95.—The Court erred in not holding that the proviso for the sale of the lands granted to actual settlers, contained in the act of April 10, 1869, and the provision as to settlers in the act of May 4, 1870, are, and each of them is, void because the same is repugnant to the grant and tends to defeat and destroy the primary purpose and intent of Congress in making the said grants in aid of the construction of the said railroads and telegraph lines.

96.—The Court erred in not holding that the said proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, for the sale of said lands to actual settlers, was intended only to apply to such actual settlers as were, at the dates of the acts of July 25, 1866, and May 4, 1870, in actual possession of said portions of said granted lands or who might become actual settlers before the filing of the map of survey.

97.—The Court erred in not holding, on the

assumption that the said provision in the said acts of April 10, 1869, and May 4, 1870, for the sale of said granted lands to actual settlers, were conditions subsequent, that Congress and complainant waived any breach of said provisions or right to forfeiture by:

(a) Permitting the said grants to be administered by the grantees and their successors for a period of over thirty-eight years prior to the passage of the joint resolution of April 3, 1908, and prior to the commencement of this suit on the 4th day of September, 1908, with the knowledge of Congress and complainant; and

(b) The passage of the act of June 25, 1868; and

(c) The passage of the forfeiture act of January 31, 1885; and

(d) The repeated refusal of Congress to pass any other forfeiture act than the general statute on that subject; and the forfeiture act of September 29, 1890; and

(e) The continuous and regular issuance by complainant of patents to said granted lands.

98.—The Court erred in not holding, on the assumption that the act of July 25, 1866, constituted and was a single grant, and so as to the West Side grant, both or either, that a waiver on the part of Congress and the complainant of any breach of the proviso or clause as to sales to settlers in said grants, or either of them, and of forfeiture on account thereof, as to a portion of the same, with knowledge on the part of Congress and the complainant, was a waiver as to the entire grants, both or either.

99.—The Court erred in not holding, on the



assumption that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, as to sales of said granted lands to actual settlers, are conditions subsequent, that each of said conditions subsequent is void for the following reasons.

(a) It is retroactive and its effect would be to divest the title of defendant, Oregon and California Railroad Company; and

(b) It is in restraint of and prohibits alienation except as to a particular class of persons; and

(c) The restraint on alienation is inconsistent with the purpose of the grant and the estate granted; and

(d) The said condition does not fix a definite time within which any of the lands shall be sold to actual settlers; and

(e) The said conditions does not define who is an actual settler; and

(f) The sale of said lands is wholly dependent upon there being actual settlers thereon, an uncertain event, and the restraint contained in said provision amounts to a perpetuity; and

(g) Because said conditions do not contain any clause of re-entry or forfeiture for a violation thereof.

100.—The Court erred in not holding that the complainant by its conduct in relation to the lands granted by said acts of Congress has waived, and is estopped from claiming, a forfeiture thereof.

101.—The Court erred in not holding that the grantees under said acts of Congress or their

successors, associates or assigns, had the right to mortgage the whole, or any part, of said land grant to obtain money wherewith to construct the said railroad and telegraph line.

102.—The Court erred in not holding that under the terms and provisions of said act of Congress of April 10, 1869, and of May 4, 1870, the grantee or grantees mentioned in said land grants cannot and could not perform the said provisions as to the sale of the lands granted to actual settlers, and by reason thereof, performance of said provisions was excused and the said granted lands vested in said grantees absolutely and discharged of said conditions.

103.—The Court erred in not holding that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, as to the sale of the lands granted by said acts to actual settlers was and is unilateral and void in that actual settlers are not bound to purchase and the grantees under said grants could not compel settlers to purchase any portion or portions thereof.

104.—The Court erred in not holding that the grantee or grantees under said land grants in any event were required to sell to actual settlers only during the construction of the said railroad.

105.—The Court erred in not holding that during the period of construction of said railroad there were no actual settlers on any portion of said land grants and for that reason a sale thereof could not be made to actual settlers in any quantity, and by reason thereof the said grantee or grantees under said land grants took

the same, discharged of any provision for the sale thereof to actual settlers.

106.—The Court erred in not holding that during the construction of said railroad it was impossible for the said grantee or grantees under said land grants to sell any portion of said grants to actual settlers, and that by reason thereof such sale was excused and the title to said granted land in Oregon and the whole thereof vested in the said defendant, Oregon and California Railroad Company.

107.—The Court erred in not holding that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, of and when operative, was directive to the Oregon and California Railroad Company to sell to actual settlers only, land in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents (\$2.50) per acre, and did not prohibit the sale of said granted lands to persons other than actual settlers in any quantity and at any price.

108.—The Court erred in not holding that the purpose of the said proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, for the sale of said granted lands to actual settlers in quantities not exceeding one quarter section to each purchaser and at a price not exceeding two dollars and fifty cents (\$2.50) per acre, was to give to actual settlers an option to purchase lands in said grants on said terms and not intended to prohibit the said Oregon and California Railroad Company from selling the lands in said grants to others



than actual settlers in any quantity and at any price.

109.—The Court erred in not holding that Congress, in passing the act of April 10, 1869, and the act of May 4, 1870, contemplated two classes of persons to whom said granted lands would be sold in aid of the construction of said railroad, namely, actual settlers in possession of some portion of said grant, and persons who are not actual settlers and who are not in possession of any portion of said grant.

110.—The Court erred in not holding that the said proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, are, and each of them is, in restraint of alienation and void in that:

(a) It limits the time during which the property can be held by the grantee.

(b) It provides for the alienation to a limited class of persons.

(c) It limits the amount of land which may be sold to any one person.

(d) It limits the price at which it can be sold.

111.—The Court erred in holding that the said land grants did not become operative until the Railroad Company filed its assent to the terms and conditions of Section Six of the act of July 25, 1866, as amended April 10, 1869.

112.—The Court erred in holding that issuance of patents to said lands by the land department was not a waiver on the part of the complainant of the right to insist upon the performance by the Railroad Company of the pro-

visions in said grants as to the sale of lands to actual settlers.

113.—The Court erred in holding that the act of Congress of April 10, 1869, was a renewal or revival of the grant under the act of Congress of July 25, 1866, or that the said act of April 10, 1869, was other than a waiver of the right of forfeiture on account of any of the conditions in said grant.

114.—The Court erred in holding that at the time of the passage of the said act of Congress of April 10, 1869, the said land grant under the act of Congress of July 25, 1866, had lapsed.

115.—The Court erred in not holding that this suit cannot be maintained as one to enforce forfeiture nor to quiet title, because—

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture has not been adjudicated by a court of law; and

(c) The defendant, Railroad Company, holds the legal title to and the possession of said granted lands.

116.—The Court erred in not holding that the said defendant, Oregon and California Railroad Company, was entitled to a trial by jury of the issue as to whether or not any of the conditions of said grants, or either of them, had been breached.

117.—The Court erred in not holding that the complainant and Congress had knowledge of all the alleged breaches of the provisions in each of said land grants for the sale of the granted lands to actual settlers; and that the complainant and Congress acquiesced in said breaches,

with the knowledge thereof and complainant is estopped to claim a forfeiture of said land grant, or any part thereof.

118.—The Court erred in not holding that during the year 1879, down to and including the year 1903, reports were regularly and semi-annually made of the transactions of the land department of said defendant, Oregon and California Railroad Company, to the Auditor of Railroad Accounts created by the act of Congress of June 19, 1878, showing the total cash receipts from all sales of the said granted lands to the date of said report; the average price per acre for all sales to the date of said report, and the average price per acre for all sales during the half year; the average price per acre for all purchases to the date of said report; the maximum price per acre from sales (not town lots); the minimum price per acre from sales (not town lots); the maximum price per acre asked at the time of making such report; the minimum price per acre asked at the time of making such report; and that the Auditor of Railroad Accounts, pursuant to the provisions of the said act of Congress of June 19, 1878, made like annual reports during the whole of said period to the Secretary of the Interior, and that annually during the whole of said period the Secretary of the Interior transmitted the said reports to Congress, and that said reports showed that during the year 1879, down to and including the year 1903, the said defendant, Oregon and California Railroad Company, sold some of said granted lands at a price in excess of two dollars and fifty cents (\$2.50)



per acre; also in quantities exceeding one hundred and sixty (160) acres; and that Congress and complainant, with the knowledge of the said matters and things contained in said reports, acquiesced therein and permitted the said defendant railroad company to take action accordingly and to alter its position and to continue to so administer said grant, and that complainant was, and is, therefore, estopped from claiming a breach of any of the conditions, if such there be, in said grant, or a forfeiture on account thereof, and has waived said alleged breaches and acquiesced therein.

119.—The Court erred in not holding that the complainant was estopped by the act of the Secretary of the Interior in approving, as bases of lieu land selections, deeds conveying property sold in alleged violation of the said provisions in said grants as to the sale of said granted lands to actual settlers only.

120.—The Court erred in holding that the 'East Side Company,' so-called, by accepting the grant under the Act of Congress of July 25, 1866, as amended by the act of April 10, 1869, was estopped from denying the right or power of Congress to pass an Act imposing any conditions repugnant to the original grant.

121.—The Court erred in not holding that the Act of Congress of July 25, 1866, granting the lands therein described to aid in the construction of a railroad and telegraph line, without any direction as to the manner of sale or disposition thereof, to aid in the construction, said railroad company had the right to sell or mortgage the whole of said granted lands for such purpose.

122.—The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

123.—The Court erred in not holding that the evidence in this cause is insufficient to support or sustain the decree rendered herein.

124.—The Court erred in not holding that the evidence in the above entitled cause was wholly insufficient to sustain and support the decree rendered in said cause, in that there is no evidence in the record showing any breach or violation of the proviso in the act of Congress of April 10, 1869, or of any of the provisions of the act of Congress of May 4, 1870, as to the sale of said granted lands to actual settlers only, in quantities not exceeding one hundred and sixty (160) acres to one purchaser and at a price not exceeding two dollars and fifty cents (\$2.50) per acre.

125.—The Court erred in not holding that the evidence in said cause was insufficient to support the decree rendered herein or any decree in favor of complainant in that there is no evidence in this cause showing any breach or violation of the proviso in the act of Congress of April 10, 1869, or of any of the provisions of the act of Congress of May 4, 1870, as to the sale of the said granted lands to actual settlers.

126.—The Court erred in not holding that the evidence in this cause was wholly insufficient to sustain the decree rendered herein or any decree in favor of complainant, in that there was no evidence on which to base a decree of forfeiture of the lands described in the bill of complaint herein, for any alleged breach of any condition in either of said acts of Congress.



127.—The Court erred in rendering the judgment and decree herein against the said defendant, Oregon and California Railroad Company, forfeiting the lands and estates in lands described in the said decree, or any of said lands, in that there is no evidence whatever in the record in this cause showing that the said defendant violated or breached any condition in either of the said acts of Congress of July 25, 1866, or April 10, 1869, or May 4, 1870.

128.—The court erred in holding that the patents issued in respect to the said land grants, or either of them, or any part thereof, were not conclusive against complainant as to any breach of assumed condition subsequent, or any forfeiture resulting therefrom, or from any cause whatever.

129.—The Court erred in holding that the title to so much of either of said grants as had been patented was not concluded against complainant herein by the acts of Congress of March 3, 1891, and March 2, 1896.

130.—The Court erred in holding that the title to so much of either of said grants as had been patented prior to October, 1902, was not concluded against complainant herein, and that the alleged cause of action had not been barred and the title to such patented lands made absolute.

131.—The Court erred in holding that the grant of lands under the act of July 25, 1866, had lapsed at the time of the passage of the act of Congress of April 10, 1869; and at the same time holding that the proviso in said act of April 10, 1869, for the sale of said granted



lands to actual settlers, is a condition subsequent, and in not holding in such behalf that a condition subsequent must attach to a title or grant previously existing, or to a title or grant created at the same time the condition subsequent is imposed.

132.—The Court erred in not holding that a condition subsequent which may defeat a grant, if breached, must be imposed in the same act creating the grant, or if imposed in a subsequent act, then the act creating the grant must reserve the right to impose or annex such condition.

133.—The Court erred in not holding that the act of Congress of April 10, 1869, was not a new grant or a revival of the old grant, but a waiver of a right to forfeiture of the grant already made under the act of July 25, 1866.

134.—The Court erred in not holding, assuming the said 'actual settler clause' in each of said acts of Congress to be a condition subsequent, and certain, and definite, so as to be enforceable that it was repugnant to the grant and is void.

135.—The Court erred in not holding that if actual settlers did not apply to purchase the granted land and if they were not sold by or before the time following completion and acceptance of the road, then, and thereafter the said 'actual settler' clause in each of said acts became inoperative and whether the words of the 'actual settler' clause created a covenant or condition, the railroad company took an estate in the unsold lands absolute and unconditional.

136.—The Court erred in not holding that it

is the duty of the land department of the United States to administer the land laws thereof and to determine in the first instance who are 'actual settlers'; and that the proviso in the act of April 10, 1869, and the provisions in the act of May 4, 1870, in that regard, are and each of them is void, and that it was beyond the power of Congress to impose upon the railroad company a function belonging exclusively to the land department of the United States.

137.—The Court erred in not holding that the said provisions in the act of April 10, 1869, and the provisions in the act of May 4, 1870, as to the sale of such lands to actual settlers are and each of them is void, and that no method or procedure is provided in either of said acts whereby it can be determined who are actual settlers within the meaning of either of said provisions; and the question as to who are actual settlers upon such granted lands is a question committed by the laws of the United States to the land department thereof."

## PART II.

Brief of Oregon and California Railroad Company,  
Southern Pacific Company, Stephen T. Gage,  
individually and as trustee, upon the  
law of the case.

### I

THE ACT OF CONGRESS OF JULY 25th, 1866, WAS PASSED FOR THE PRIMARY PURPOSE, NOT OF PROMOTING THE SETTLEMENT OF THE PUBLIC LANDS, BUT OF AIDING IN THE CONSTRUCTION OF A RAILROAD FROM A POINT ON THE CENTRAL PACIFIC RAILROAD IN THE STATE OF CALIFORNIA TO PORTLAND, IN THE STATE OF OREGON; AND ANY PROVISION IN THE LATER ACT OF APRIL 10, 1869, FOR THE BENEFIT OF SETTLERS MUST BE TAKEN IN SUBORDINATION TO THIS PRIMARY PURPOSE.

The Pacific Railroad Acts are a familiar chapter in the history of this country. Under the Union Pacific Act of July 1, 1862, (12 Stat., 489) the Union Pacific Railroad was constructed from the Missouri river to Ogden, and in continuation of this railroad line, and under the same act, the Central Pacific was constructed from Ogden to the bay of San Francisco. The Union Pacific act is entitled in terms—"An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes". The construction of the Union Pacific-

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Central Pacific Railroad gave the country a trans-continental line between the Missouri river and San Francisco, California. The Oregon and California railroad act of July 25th, 1866, on which this case turns, was a sequel and a natural extension of the Union Pacific Act, strictly in pari materia, and designed to make the Union Pacific-Central Pacific Trunk Line serve as well the State of Oregon, with Portland for the terminus, as the State of California with a terminal at San Francisco. This was to be accomplished by extending the Union Pacific-Central Pacific line from "some point on the Central Pacific Railroad in the Sacramento Valley, in the State of California," (Sec. 1, Act of July 25, 1866, 14 Stat., 239.) through the State of California to the Oregon boundary, and thence Northerly through the State of Oregon to Portland.

*If the primary purpose of the Union Pacific Act was, as the title of the act says it was, to aid in the construction of a railroad, it is not easy to see why the Oregon and California Act, which says the same thing, does not mean the same thing, and express the same primary purpose.* In the opinion of the Supreme Court of the United States in U. S. against Union Pacific R. R. Co., 91 U. S., 79, it was said "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the cir-

cumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

“This enterprise was viewed as a national undertaking for national purposes; and the public mind was *direct* to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

“It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

“Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of



intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

“The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this was not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

“It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite

skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed *incidental advantages which the public would derive from the completion of the projected railway*. But the *primary object* of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the *securing a road which could be used for its own purposes*. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

“It has been observed by this court, that the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. *Hadden v. The Collector*, 5 Wall, 110. This is true, and we have no disposition to depart from this rule; but the title even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purposes of Congress in passing it. It is “An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure for the govern-

ment the use of the same for postal, military, and other purposes." That there should, however, be no doubt of the national character of the contemplated work, the body of the act contains these significant words; "And the better to accomplish *the object of this act,—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes,—*Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat., p. 427. Indeed, the whole act *contains unmistakable evidence*, that, if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be *no misunderstanding about the objects to be attained*, or the motives which influenced its action."

Laying the titles of the two acts—Union Pacific Act and Oregon and California Act—one along side the other, the Union Pacific Act is entitled:

"An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes;"



And the Oregon and California Act is entitled:

“An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California to Portland in Oregon.”

Indeed, the Oregon and California Act, supplementary, as it is, to the Union Pacific Act, is, if anything, *more specific and concrete* in its title touching this precise matter of the land grant; for, whereas the Union Pacific Act is said to be, generally “an act to aid in the construction of a railroad and telegraph line,” now the Oregon and California Act is said to be “an act *granting lands* to aid in the construction of a railroad and telegraph line.” The language of the Supreme Court in the Union Pacific Case is full and instructive to the point of the military and economic purposes of the government in aiding the construction of this trans-continental road from the Missouri river to San Francisco and Portland. What the government was aiming to secure was a road to subserve these purposes. *It was not passing a homestead law or a preemption act. It was passing a railroad construction act.* “The primary object of the government”, as the Union Pacific Case says, “was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the securing a road which could be used for its own purposes.”

The Act itself of July 25, 1866, the body of it in distinction from the title reads:

“Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, *for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad,* every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line;”

Now, in the Union Pacific Case, *supra*, the Supreme Court says: “Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private capital alone. It was a national work, originating in national necessities, and requiring national assistance.”

If the building of the road could not be worked out by private capital alone”—if it was “a national work, originating in national necessities, and requiring national assistance”,—then the Act of July 25, 1866, is a scheme of national assistance for the building of a railroad. But the assistance was a land grant, that and nothing more; how was this land grant to be made good as an aid to the con-

struction of the road? It took money to get a road bed, lay rails, find engines and cars to run on them, and provide terminal and intermediate facilities. Money must be gotten out of the land grant—but when and how?

Of course, the company was not to build the road first and look for the money afterwards. The money had to come first—no money, no road. How to make the land grant yield in the first instance—that was the real question. What was the mind of Congress on that point?

Did Congress think and intend that the Railroad Company, as a corporation on paper, and before it had any railroad, should go into the market with its three million acres of granted land, get somebody to buy that territory, and build the railroad with the purchase money? Was that the mind of Congress in respect to “a vast unpeopled territory”, which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property?” (Union Pacific Case, *Ubi supra*) How about construction bonds, secured by a mortgage of the land grant, and distributed in varying quantities among a number of bondholders? Congress, by main strength and awkwardness, might have put a prohibition in the granting act against mortgaging; “it might originally have prohibited the borrowing of money on mortgage;” (Sinking-Fund Cases, 99 U. S., p. 721);



but it did not. That would not have been a sane thing to do. "Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. A large amount of money is required for construction and equipment, and this to a great extent is represented by a funded debt, which, as well as the capital stock, is sought after for investment, and is distributed widely among large numbers of persons." (Sinking-Fund Cases, *supra*, p. 722)

An instance in point, to go back to the comparatively early date of 1832;—Congress had granted to the State of Indiana "certain lands to aid in the construction of a canal designed to unite the waters of Lake Erie with those of the Wabash River." (Trustees of Canal Company v Beers to Black, U. S., 448) On June 7th, 1832, the State Legislature authorized the Canal Commissioners to borrow Two Hundred Thousand Dollars for construction purposes, and provided, in the fifth section of the Enabling Act, as follows: "That for the payment of the interest, and redemption of the principal of the sums of moneys which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be and are hereby irrevocably pledged and appropriated, all the moneys in any manner arising from the lands, donated by the United States to this State, for the construction of

said section of said canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof, as finished.”

The theory and practice then, under this land grant of 1832, was to issue bonds secured by the granted land, and to appropriate all moneys “in any manner arising from the lands,” to the redemption of the bonds. The same thing was done under the Union Pacific-Central Pacific land grant of July 1, 1862. This is pointed out in *Francoeur v Newhouse*, 40 Fed., p. 621, decided on December 9th, 1889. “These lands,” said the court, “soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which, the road was constructed; *and the proceeds of these sales are devoted by the trustees to the redemption of the bonds.*” The right to mortgage the granted land was a necessity of the case; in no other way could the land grant be availed of in aid of construction; and “the right to mortgage includes a right in the mortgagee to have a sale of the land in satisfaction of the obligation for which the mortgage was given.” (*Estate of Pforr*, 144 Cal., p. 126)

The Railroad Company in Oregon did, with its land grant, just what every other Railroad Com-

pany did—what the Central Pacific Railroad Company did, what the Union Pacific Railroad Company did; it mortgaged the land to secure its construction bonds, and it appropriated the sales of the granted land to the redemption of those bonds. There is nothing in the Pacific Railroad Act, either in terms or by implication, from which the somewhat astonishing deduction can be made, that the line to San Francisco, California, could mortgage its land grant for construction money, but the line to Portland, Oregon, could not. The Oregon Act, the Act of July 25, 1866, was amended by the Act of June 25, 1868, but that was an amendment to Section 6 of the original Act, extending the time for the completion of the first twenty miles of the road eighteen months from the date of the amendment, June 25, 1868, and allowing two years instead of one year for each successive section of twenty miles, and requiring final completion on or before July 1st, 1880, instead of July 1st, 1875. There is nothing in this amendment inconsistent with, or germane to, the right to bond the land for construction money. (15 Stat., 80)

On April 10, 1869, nearly three years after the land had been granted in aid of railroad construction by the original Act of July 25, 1866, another amendment was made to Section 6 of the Granting Act. The original Act had in contemplation a California corporation to do the railroad building in California from a point on the Central Pacific Rail-



road near Sacramento, California, northward through California to the Oregon boundary, and an Oregon corporation to do the railroad building in Oregon from Portland, southward to the California line. Section 6 enacted, "that the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof." The Act of 1866, committed to the Legislature of Oregon the designation of the Railroad Company to do the construction work in Oregon. The so called Westside Company, under a claim of designation by the Legislature filed in the Department of the Interior, within one year after the passage of the Act of 1856, its assent to that Act. But according to the bill of complaint in this case, the so called Westside company never became—to use the words of Section 1, of the Act of 1866—"a company organized under the laws of Oregon; as the bill of complaint has it, on October 6, 1866, "certain persons *attempted* to organize;" four days later, on October 10th, 1866, the State Legislature designated this "attempt" at corporate organization. On April 22nd 1867, as the bill sets forth, certain residents of Oregon, "contending that said Westside Company was never lawfully incorporated or organized, and designing to secure the several grants, franchises and other benefits of said act of Congress approved July 26th, 1866, in that behalf caused certain proceedings to be had intended to organize, under the general incorporation law of the State of Oregon," a corporation bearing the

same corporate name as the Westside Company, namely, Oregon Central Railroad Company. The bill explains that "said last mentioned Oregon Central Railroad Company projected its land of railroad on the easterly side of the Willamette river"—hence it came to be known as the Eastside Company in distinction from the "attempted" organization known as the Westside Company.

On October 20th, 1868, the Legislature of the State, with the subsequent approval of the Governor, made its finding that when the attempted Westside Company got the later legislative designation in the joint resolution of October 10th, 1866, "no such company as the Oregon Central Railway Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and the designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred, by the said act of Congress, yet remains to be made." It was thereupon resolved that the Eastside Company be designated, and the designation was accordingly made.

"Such Company organized under the laws of Oregon as the Legislature of said State shall *hereafter* designate," (Sec. 13, Act of July 25, 1866) not having been organized under the laws of Oregon until April 22nd, 1867, the date of the organization

of the Eastside Company, and not having been designated by the Legislature of Oregon until October 20th 1868, the date of the legislative designation of the Eastside Company, it follows that the original requirement of Section 6 as to the filing by the California Company and the Oregon Company of their assent to the Act of 1866 within one year after the passage of that Act, was impossible of performance by "such company organized under the laws of Oregon as the Legislature of said State shall *hereafter designate*;" for such company was not designated within one year after the passage of the act, nor until October 20th, 1868. That was the point of time at which the grant to the Oregon Company took effect. (Hall v Russell 101 U. S., p. 509, 510) When the title, therefore, vested in the Eastside Company as of October 20th, 1868, the condition subsequent of the filing of assent, possible of performance only within the year ending July 25th, 1857, had become impossible of performance, and therefore the grantee took the land discharged of the condition. (Hughes v Edwards, 9 Wheat. p. 492.) No formal acceptance in writing of the grant was now necessary. It is quite consistent with the bill, and it is the historical fact, that the Eastside Company began construction prior to April 10th, 1869, and as early as April 16, 1868 (Vol X, p. 4939) Its acceptance of the grant, as being a grant to a corporation in anticipation of its organization, would be presumed from the fact of the organization. (Wharf Company v Judd 108 Mass., 227)



The engagement by the Company in construction work as early as April 16, 1868, established the fact of its acceptance. (*Bank v. Danbridge*, 12 Wheat., p. 71; *Ry. Co. v. Greenalgh*, 139 U. S., p. 22)

It was not within the competency of Congress, therefore, by the amendment of April 10, 1869, to burden or impair the vested rights of the Eastside Company by requiring it to file its assent to the Act of 1866 within one year from the passage of the amendment or at all; indeed, in this point of view, the amendment was simply permissive; nor was it competent to Congress, in this same amendment, to work any impairment of the vested rights of the Company by the enactment of the proviso, "that the land granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre." If the fee simple had vested in the Company prior to the amendment, Congress had no power to attach, to a vested estate this *ex post facto* proviso. (*Morgan v Rogers* 79 Fed., p. 580) The circumstance that the Eastside Company, whether inadvertently, or in error, or prudentially, did file an assent under the amendment of April 10th 1869, is not in derogation of its vested estate and works no estoppel against it. (*Bybee v Oregon and California Railroad Company* 139 U. S. 663; same case, 26 Fed., 591.)

The East Side Company, then, under the Act of July 25, 1866, responding to the status of "such Company organized under the laws of Oregon as the legislature of said State shall *hereafter* designate;" and having been so designated on October 20th, 1868; the condition imposed by Sec. 6 of the same Act, requiring the designated Company to file its assent to the Act within one year after July 25, 1866, became, as to the designated Company, impossible of performance, and when the Company took a vested estate as of October 20th 1868, it took that estate discharged of the conditions. But there is more behind. It was on June 25th 1868, that Congress first amended Sec. 6 of the original Act by extending the period of construction. It was well known, at the time of this amendment, by the public and by Congress, a fact of notoriety, that two companies, West Side and East Side, were competing for the grant. The East Side Company had been organized on April 22nd 1867. Its articles of incorporation (Vol. IV, p. 1630) made plain its purpose to earn the grant. On May 1st 1868, it issued and distributed generally a public notice and circular that such was its purpose. (Vol. X, p. 51-58.) It actually began construction work on April 16, 1868, (Vol. X, p. 49-39.) Its West Side rival began competitive construction only the day before. (Vol. IX, p. 1760.) Indeed, on April 29, 1868, the East Side Company adopted a resolution accepting the grant of July 25, 1866 and empowered A. M. Loryea to present a copy, duly certified by the Sec-

retary of the Company, to the proper authorities to be filed (Vol. XIV, pp. 7454-5.) This acceptance was transmitted by Loryea in his letter of July 16, 1868 to Secretary Browning (Vol. XIV, p. 7454.) and was acknowledged by the Secretary under date of July 17, 1868. (Vol. XIV, p. 7440.) It thus appears that, with the exception of the correspondence between Loryea and the Secretary, all these proceedings, on the part of the East Side Company, of corporate action and actual railroad construction, were prior in point of time to the passage of the amendment of June 25, 1868, extending the period of construction. The situation was plain enough to Congress when this amendment was passed. Two companies were in the field and at work. The East Side Company, in its public circular, had denied the corporate organization of the West Side Company, and in its own articles of incorporation and in this same circular, and by its corporate action, and by actual and open construction work, had signalized its purpose to gain legislative designation as the company indicated by the original granting act, and as such company to take and earn the grant. Congress, as the amendment of April 10, 1869 shows on its face, was not arbitrating or resolving the controversy between the two competing companies, or seeking to prejudge the merits as between them. When it passed the amendment of June 25, 1868, it was extending the time for construction, as much for the benefit of one company as the other. But Congress could not



effectively or at all extend the time for the benefit of the East Side Company, if the original requirement as to the filing of assent was to be insisted upon; for the East Side Company could not then file an assent within a period of time—one year from July 25, 1866—which had already gone by. The amendment of June 25, 1868, must be held to be a dispensation of the East Side Company from the necessity of filing such a written assent as had been contemplated by the terms of Sec. 6 of the original Act. The terms of the later amendment of April 10, 1869, amending the original act “so as to allow any railroad heretofore designated by the legislature of the State of Oregon in accordance with the first section of said Act, to file its assent to such Act in the department of the Interior within one year from the date of the passage of this Act”, is obviously permissive. Indeed, it is claimed by the Government that it proceeded from the initiative of the East Side Company itself. Whether that company had doubts of the validity or certainty of its own title, in the absence of a written assent, filed within the first year, or was acting out of abundant precaution, or was inadvertently confessing an infirmity of title which it sought to cure—it remains that if its rights had actually vested, prior to April 10, 1869, no impairment of those rights would be made by this permissive feature of the amended act, nor would any estoppel be raised against the company by its subsequent act of filing a written assent. (Bybee case, 26 Fed. 591; 139 U. S. 663.)

The proviso, therefore, in the amendment of April 10th, 1869, does not go in impeachment of the Railroad Company land grant, and its right to mortgage the granted land for construction money, because the Railroad Company is not bound by the proviso, and it was not competent to Congress, *ex post fact* to burden the estate with that proviso. But there is another reason why the power of the company to mortgage the land grant, and the rights of innocent bond holders who have advanced in good faith, nearly twenty millions of money, to build a railroad, should not be defeated by this proviso. And that reason is this: that if the requirement of the proviso, as to sales to actual settlers be deemed to have been competent to Congress to exact, yet it is not the meaning or construction of the Acts of Congress of 1866, 1868 and 1869, read fairly and as a whole, that this incidental proviso, found as an after thought in the last amendment to a single section of the original granting act, should operate to defeat the paramount purpose of the Legislature, namely, the construction of a railroad, and to put in place of the primary purpose of Congress, something which, at the best, was secondary and subsequent in its nature and design.

It cannot seriously be imputed as the intent of Congress that the construction money for the railroads should be raised by selling these lands to actual settlers, in quantities not to exceed one hundred and sixty acres to the settler, and at not more

than two and a half an acre. It is not serious argument, or a sensible construction of the law, to imagine a host of actual settlers marching across "the vast unpeopled territory" (Union Pacific case, *supra*) between the Missouri River and the Pacific Coast, pioneering their way into the Oregon timber forests, taking up quarter sections or less, making a clearing, and finally settling down on an agricultural basis—all this in advance of any railroad—paying two dollars and a half an acre for the land, and waiting there for the railroad that was to be financed with the two dollars and a half an acre. As the Supreme Court said in the Union Pacific case, *supra*, the land would be "practically worthless without the facilities afforded by a railroad for the transportation of the persons and property;—with its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased." (91 U. S. p. 80.)

This land grant, then, was mortgaged; it has been mortgaged from the beginning. The present mortgage, made July 1st, 1887, of which the Union Trust Company of New York is trustee and by which twenty millions of bonds are secured, is the latest expression in the refunding of the obligations which date back to the original lien. The bill of complaint states that about two hundred and fifty thousand acres had been sold by the company prior



to May 12th, 1887; "that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities and for prices slightly in excess of the aforesaid limitations, prescribed by said land grants respectively." The use of the words "land grants," in the plural, is for the purpose of taking in the smaller land grants subsequently made to the West Side Company. Here, then, is an avowal by the bill itself, that there was no substantial departure from the limitations of the proviso as to actual settlers up to May 12th, 1887; and the bill avers that "until about the year 1893 there was no marked change in the manner of the disposition of said lands. Now, the present mortgage, by which the outstanding bond holders are secured, Exhibit H to the bill, bears date July 1st, 1887, and was acknowledged by the Oregon and California Railroad Company and the Union Trust Company of New York on January 3rd, 1888. No sales of the granted lands have been made since this mortgage, or under this mortgage, except in redemption of the security from the lien of the construction bonds—as the court said in *Francoeur v Newhouse*, 40 Fed. p. 621, in speaking of the mortgage of the Central Pacific land grant, "the proceeds of these sales are devoted by the trustees to the redemption of the bonds." This appears from the terms of Exhibit H to the bill, which reads: "In case the party of the first part, or its successors shall contract to sell and dispose of any of the lands granted by the United States and

covered by this mortgage at prices which are assented to by the party of the second part, or its successors in this trust or its or their agent or agents on that behalf, then and in that event the party of the second part, or its successors in the trust, or any agent or agents on its or their behalf authorized so to do, shall execute such releases and conveyances as may fully discharge the lands so contracted to be sold from the lien of these presents. Provided, however, that in all cases the purchase money or price be paid to and received by the party of the second part or its successors in the trusts, or its or their duly authorized agent. For the purpose of facilitating such sales the Trustee hereunder may, from time to time either concur with the party of the first part or its successors in appointing an agent to make such sales and execute such releases as its attorney in fact, or may appoint an agent of its own to execute such releases and conveyances as its attorney in fact, and it may delegate to any such agent all its powers and duties in respect to the sale of lands. The proceeds of lands so sold shall be applied by the said party of the second part or its successors in the trust to the redemption and cancellation of the bonds to be issued hereunder."

The pledge and appropriation of the proceeds of the sales of granted lands, in redemption of railroad construction bonds, is recognized by Congress in the Act, approved May 4th, 1870, making a land

grant to the West Side Company "to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon." Indeed, Sec. 5 of this Act not simply empowered but required the Company to do this very thing. But the construction mortgage required by the Act of 1870 is, in express terms, referred to a specified part of the grant, namely, "the road depots, stations, side tracks, and wood-yard." If Congress, in the East Side grant of 1866, had contemplated a similar restriction, it would have said so. Reading the two acts together, that of 1866 granting lands to the East Side Company and that of 1870 granting lands to the West Side Company, the conclusion is not to be avoided that Congress, as well in the earlier as in the later grant, had in mind the application of the land to the redemption of construction bonds; but whereas the bonds are limited as to the security in the later act, no restriction will be found in the earlier act upon the power of the Company to make a general railroad mortgage of the granted land, redeemable by the application to the construction bonds of the proceeds of sales of the lands which underlay the bonds as security.

The Union Pacific Act of 1862 uses the expression "sold or disposed of by said company", in respect to the granted lands. The Supreme Court of the United States, in giving meaning to the term "disposed of", found it to include the right of the



company to make a construction mortgage; and this meaning, the Court evolved from the necessities of the situation. In the view of the Court, a construction mortgage was the only available way of making use of the grant in aid of the construction of a railroad; and the right of the company to make such a mortgage was the natural and reasonable significance to be attached to the term "disposed of". Every consideration and every argument urged by the Supreme Court in the case of the Union Pacific grant, making for the right of the company to issue construction bonds secured by a mortgage of the grant, is just as apposite to the case of the Oregon land grant to the East Side Company. *Platt v Union Pacific Railroad Company*, 99 U. S. 48, is the case.

The Union Pacific Act of 1862, in Sec. 3, after granting the odd numbered sections "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," goes on with this proviso

"Provided, that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section which shall not be sold or disposed of by said company within three

years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding \$1.25 per acre to be paid to said company."

It was provided in the Union Pacific mortgage (Platt case, *supra*, p. 52) "that the lands shall be under the management and control of the company, to be by it sold or contracted to be sold for such prices and on such terms of payment as shall be mutually agreed upon by the company and the trustees; that the trustees shall, upon payment of the purchase money of the several tracts which may be sold, receive and apply the same, and the proceeds of all sales made by them of lands so conveyed to them, to the sole and exclusive purpose of the payment of the said coupon bonds, until the same and the whole thereof shall be fully paid and satisfied, and thereafter to re-convey to the company the residue of said lands remaining unsold." The similarity between this provision and the corresponding one in the East Side Company's mortgage to the Union Trust Company of New York, will be noticed.

Upon a preemption entry, filed September 21, 1878, William H. Platt brought his bill in equity on September 28, 1878, to enjoin the Union Pacific Railway Company from prosecuting an action of ejectment which it had commenced against him five days previously for the recovery of a quarter section

of land in Hall County, Nebraska, of which Platt was in possession claiming equitable title. The case went off on the sufficiency of Platt's bill in equity. The language of the Supreme Court in deciding the case is very instructive.

"The railroad and telegraph line", says the Court, "entirely completed before July 1, 1874 (if not in 1869), and patents for all the lands granted were directed to be issued to the company in November of that year. By force of the grant, however, and by the definite fixing of the route of the road, and the filing the map thereof in the Interior Department, as required by law, together with the completion of the road westward and beyond the tract claimed by the complainant, the title to that tract had become vested in the company before April 16, 1867. On that day the company, for the purpose of raising money necessary to continue and complete the construction of their road, issued their coupon bonds for the sum in the aggregate of \$10,400,000, bearing seven per cent interest, and payable in twenty years from their date. On the same day, for the purpose of securing the payment of the bonds, the company executed a mortgage or deed of trust to trustees of all and several the several sections of land granted to them by the said acts of Congress, including the tract claimed by the complainant. The instrument, we think, though in form a deed of trust, was substantially a mortgage. It was delivered to the trustees, and duly recorded. The bonds



were sold in different markets to bona fide purchasers, and they are now outstanding, about \$7,000,000 still remaining unsatisfied. All this was before the entire road was completed, and before the first step was taken by the complainant to obtain his pre-emption right."

"In view of these facts, we are to determine whether the mortgage was a disposition of the lands granted to the company within the meaning of the last clause of sect. 2 of the act of 1862. If it was, the tract of land claimed by the complainant was not open to settlement and pre-emption when he entered thereon, nor has it been at any time since. That clause declared that 'all the lands granted by the section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption,' &c. Was the mortgage a sale or disposition of the lands as understood by Congress? That the company had power to mortgage the lands admits of no reasonable doubt. It may be conceded that a railroad company has not power either to sell or mortgage its franchise, or perhaps the road which it has been chartered to build, without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purposes the legislature had in view in the grant of the charter. The adventurers who obtain the charter and who accept it undertake to

construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent they cannot throw off the obligation they have assumed. But the reason is inapplicable to a sale or mortgage of property which is not a part of the road and in no way connected with its use. Parting with such property or incumbering it in no degree interferes with the performance of the duties of the company to the public. Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations, or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership,—the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the company by the legislature that granted the charter, without any restriction of their use.”

The court now goes on to say that the expression “or disposed of” must have some distinctive meaning, some meaning beyond the word “sold”. What that meaning is, the court reaches by a consideration of the whole act of 1862—its characteristic purpose and policy.

“What that is,” the court says of the meaning in question, “may be seen very plainly when the whole act of 1862 is examined. We are seeking for the intention of Congress, and to discover that we may

look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object. Congress addressed itself to the work of securing a railroad from the Missouri River to the western boundary of the Territory of Nevada, and thence to the Pacific Ocean. The work was vast, beyond the reach of private capital or enterprise. It could be accomplished only by the bestowal upon a corporation of very large governmental aid. The proposed road ran over mountains and through what was known to be an uninhabited desert, for more than a thousand miles. The lands through which it must pass were supposed to be almost worthless, and quite unsalable, until they should be made, by the construction of a railroad, accessible to settlers and to Eastern markets. The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864



additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness—the all-absorbing earnestness—with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in *United States v. Union Pacific Railroad Co.* (91 U. S. 72), to which we refer. Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. We do not say that other incidental considerations were not kept in mind, but what we do assert as plainly manifest in the legislation is, that the paramount intention of Congress was to give such assistance to the company as to induce them to build the road. Every other consideration was subordinate to that.”

The court continues “All will concede that in constructing the act of 1862 we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers,

‘for the purpose of aiding in the construction of the railroad and telegraph line’, and securing governmental transportation, &c. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart. This, we think, was what was intended by the phrase ‘or dispose of’, as distinguished from ‘sold’. Some of the lands might be sold as the work was progressing, and others could be used in aid of the construction only by pledging them to persons who might be willing to advance money on the faith of

their prospective value. But whether sold or used as security for money loaned to advance the construction of the road, they were equally employed for the purpose for which they were granted. The words 'disposed of' are undeniably apt words to indicate a transfer by mortgage. If land be conveyed to A. to enable him to raise money for a particular purpose, nobody would doubt that a mortgage would be a disposition of the land for that purpose; and the grant made by the third section of the act of 1862 was obviously made, as we have suggested, with the intent of giving present assistance to the company in the construction of the road. It was not intended to be available only after the company had raised all the money necessary for the work. Then the time of need for the purpose mentioned would have gone by. The act declares it to have been 'to aid in the construction of the road', not to reimburse expenditures made in the construction. Hence it must have been intended that the company might use or dispose of the land in some other way than by a sale. But in what other way? Not by gift; for that would not have been in aid of the construction, and the grant was intended for that. Nor by leases. They could have brought little money. And no other mode of disposition except by mortgage has been suggested which could furnish the requisite aid for building the road. No other is conceivable. The conclusion would seem, therefore, to be almost inevitable, that Congress, when speaking of a disposition of the



lands other than a sale, contemplated making them available for the purposes of the grant by mortgage."

The difficulty of financing the construction of the Oregon Railroad by a limited use of the land grant, at a limited price per acre, in limited quantities, among a limited and uncertain class of settlers—the impracticability, in a word, of turning the construction of the road on actual settlement of the granted land—has been dwelt upon, and has been reinforced by the vigorous language of the Supreme Court in the Union Pacific case, 91 U. S. 78. A like difficulty presented itself in the Platt case. If the mortgage of the land grant, in the Platt case, was subordinate and inferior to a pre-emption right accruing three years after the completion of the road, this impairment and shrinkage in the value of the grant as a security to bond-holders, would offer serious difficulty in the way of raising construction money; and the interpretation of the granting act with such consequences, would not be reasonable or practical. The Supreme Court, holding that there was a right to mortgage, went on to say:

"And if so, it is hard to believe that only a limited interest in the lands was allowed to be hypothecated. Twelve years were designated as the period within which the road was required to be completed, and lands not sold or disposed of within three years thereafter were to be open to pre-emption. More-

over, under the provisions of the act, the title to the lands could be perfected in the company only as the work of construction advanced; that is, as each section of forty miles was completed. The company might not become entitled to some until July 1, 1874. If, therefore, a mortgage could only bind the lands unsold until the expiration of three years after that date, it would have been an hypothecation for a term of years, and as to some of the lands, for a term of only three years. Was that the aid proffered by Congress to stimulate and render possible the completion of an enterprise in which it felt so deep an interest? If so, it was a barren gift. Looking at the character of the lands and their remoteness from settlements, it must have been evident enough that money could not have been raised on the credit of such a mortgage. The power of disposition given for the express purpose of enabling the company to raise money for the construction of the road, by such an interpretation of the act is made of no value. The interpretation, therefore, defeats the manifest intention of Congress, and for that reason it cannot be accepted."

The court says further: "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We may now think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unpre-

cedented rush of emigration along the line of the railroad have shed new light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. Guided by this rule of construction, as well as by others universally recognized, we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed by this company in 1867 was a disposition of the lands granted by the third section of the act of 1862, within the meaning of that act."

And further: "We do not say that any mortgage, however small, or manifestly made to evade a bona fide execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers, and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. It may be conceded it would not be, for it would be in conflict with the avowed object of the grant. The present is no such case. By the pleadings it appears that the mortgage of 1867 was made 'for the purpose of raising money necessary to continue and complete the construction of the railroad, in accordance with the act of Congress'. Nor are we



now called upon to decide whether the lands covered by the mortgage will not be open for pre-emption, if they shall remain unsold after the mortgage shall be extinguished. That question is not now before us."

Was the Union Pacific Act, under consideration in the Platt case, a railroad construction act or a settlement act? Was it passed primarily to subserve a governmental policy of allotting the public domain in small proprietorships for actual settlement; or was the thing in mind, first and foremost, to get a railroad built, and that purpose accomplished, to distribute what was left of the grant, as a secondary policy, among settlers? The court meets this question full-face:—

"The principal objection", says the court, "urged against the interpretation we have given to the words 'sold or disposed of' is, that it is repugnant to the governmental policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and pre-emption, at a price not exceeding \$1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant. No limitation was set to the quantity of land which the company might sell to

single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no pre-emptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it. If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company, to be used for the completion of the road, as this work progressed, any secondary policy that government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and pre-emption. This appears to us to have been what was intended, and all that was intended. The construction contended for by the appellant restricts the power of disposition, denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly de-

feated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. On the other hand, utilizing the lands, by raising money upon them through a mortgage, or, in other words, disposing of them by mortgage, did not defeat the policy of opening the remnants not used to pre-emption."

It is true, as just quoted from the Platt case, that the railroad company there "was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the land or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no pre-emptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it." But the court had pointed out the impracticability of the land grant as an aid to railroad construction, by the method of sales. "The lands," the court had said, "were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for



immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart." The right to mortgage was not deduced from the use of the words "disposed of"; but the meaning, significance, and purpose of those words, was deduced from the right to mortgage; and that right to mortgage was worked out by the court as being inherent in the necessities of the situation. The Platt case is a clear and strong holding that the right to mortgage in aid of railroad construction is primary and paramount; the policy of settlement is relatively secondary and subsequent.

This court is not called upon to defeat this secondary purpose in the case at bar, much less the paramount purpose. The residue of the grant, "not used in aid of the construction of the road, either because other resources of the company might prove

sufficient, or because it might be found impossible to dispose of them in time to furnish such aid,"—Congress, in the settlers clause of the Act of April 10, 1869, "undertook to open to settlement". (Platt case, *ubi supra*). Every sale made under the mortgage, in redemption of the construction bonds, went in accomplishment of the primary purpose. The higher the prices at which the redemption sales were made, the sooner the lien would be discharged, and the larger the residue for actual settlement. If the settlers' clause of the amendment of April 10, 1869, is inadequate as a scheme for settling the residue, if it is lacking in machinery for making the secondary purpose workable, Congress, by the Twelfth section of the original granting act of July 25, 1866, had reserved the power "to add to, alter, amend, or repeal this act". (Sinking Fund cases 99 U. S. 700). Moreover, while the government concedes that the railroad company is not compellable to sell the granted lands to settlers, it argues as an alternative contention that the settlers' clause is a negative covenant, and accordingly asks, as for an alternative relief, that the railroad company be enjoined from making sales other than to actual settlers. Without derogating, therefore, from the paramount purpose of the granting act, a construction is open which gives meaning and effect to the settlers' clause of April 10, 1869.

The position of the government, in asking a forfeiture of this grant and its resumption into the

public domain, must, it is believed, give the court pause. The right of the railroad company to mortgage in aid of construction, would seem to be denied, and the redemption sales are declared to be a cause of forfeiture. The settlement of the land is argued to be the paramount purpose, and the actual settlers are said to be the prime beneficiaries, of the statute. The forfeiture of this grant does not end with the destruction of the rights of the railroad company and of the security of the bondholders whose money built the road; it goes beyond this, takes the land out of entry and settlement and back into the public domain, extinguishes the rights and hopes of the settlers, and defeats what is claimed to be the policy of the act. By the wrong of a railroad company, in making forbidden sales, for which the settlers are not responsible, and over which the settlers have no control, the rights of the settlers, favored ones of the law, go down in a common ruin.

## II.

### **THE SETTLERS' CLAUSE OF THE AMENDMENT OF APRIL 10, 1869, IS NOT A CONDITION SUBSEQUENT.**

It will be convenient to set the amendment out: *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Ore-*



gon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: *And Provided, Further*, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

The introduction of the settlers' clause by the word "provided" will not be taken as decisive, nor would the expression "on condition", if it had been used. "Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate; unless from the proof such appears to have been the distinct intention of the grantor, and

a necessary understanding of the parties to the instrument." (*Post vs. Weil*, 115 N. Y., 366.) In the *Post* case, the clause ran: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public-house of any kind." The Court of Appeals of New York said:

"Although the words of the clause in question are apt to describe a condition subsequent reserved by the grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them, which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition, or a covenant, must depend upon what was the intention of the parties; for covenants and conditions may be created by the same words." Chancellor Kent is quoted as follows: "Whether the words amount to a condition or a limitation or a covenant, may be matter of construction depending on the contract. The intention of the parties to the instrument when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument." And further: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed,

as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case."

The stress upon the intent of the parties is, if anything, weightier in the case of a legislative grant—at once a law and a conveyance. "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." (Hall vs. Russell, 101 U. S., p. 509.) Courts will not willingly impute the intent to impose a condition subsequent with its consequences of forfeiture. In Wright vs. Morgan, 191 U. S., p. 58, the Supreme Court of the United States speaks "of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used."

In Stanley vs. Colt, 5 Wall., 119, 121, the will of William Stanley, of Hartford, Connecticut, contained this provision: "After the decease of my said sister, Abigail Whitman, I give and devise the whole of my real estate, of every kind and description, except which is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever; Pro-



vided that said real estate be not ever hereafter sold or disposed of, but the same be leased or left, and the annual rents or profits thereof applied, to the use and benefit of said Society, and the letting, leasing, and managing of said estate to be under the management and direction of certain trustees hereinafter named by me, and their successors to be appointed in manner as hereafter directed." The question was, whether the sale of this real estate, made some fifty years after the Ecclesiastical Society came into enjoyment of the property, was a breach of condition subsequent, for which the heirs of Stanley could re-enter, as for a forfeiture.

"It is true," said the Supreme Court of the United States, (*Stanley vs. Colt*, *supra*, p. 166) "that the word proviso is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." This same thought is expressed by the Supreme Court of the State of Oregon in *City of Portland vs. Terwilliger*, 16 Or., pp. 469-470, where the court says, among other things, "that if there is any other reasonable construction which can be given to a deed so as to avoid a forfeiture, it ought to receive such construction."

Now, in *Stanley vs. Colt*, *supra*, the Supreme Court of the United States, on a consideration of the will, found it to be "quite clear that the trustees are clothed with the legal estate." But the intent of the testator, as the court saw it from the whole instrument, was to benefit the members of the Ecclesiastical Society. They were the "settlers" whom he had in his mind and in his policy as the beneficiaries of the land. While the trustees, like the Oregon Railroad Company, got the legal title in the first instance, Stanley, in the proviso, had subjected that title to certain qualifications, which the Supreme Court enumerated as follows:

"1. The estate is not to be sold or disposed of, but to be leased by trustees, and the rents paid over to the society.

"2. The leases are not to exceed thirty years in any one term.

"3. The estate is not to be divided in the event of a division of the society; and

"4. It is to be managed and directed exclusively by trustees who are appointed in the will, and by their successors; the surviving trustees to appoint when a vacancy happens."

Was it Stanley's intent that a sale of this land by the trustees, clothed as they were with the legal title, should work a forfeiture against the objects of his bounty, the members of the Ecclesiastical Society? Did he intend, in passing the legal title to the trus-

tees, to put it in their power, by a breach of the clause against sales, to extinguish the rights of the society? It was the benevolent intention of Congress, we are now told, to forbid the sales of the Oregon land grant, except to actual settlers—they were the exclusive beneficiaries of the statutory policy; the land was intended and was to be kept, for them. Did Congress intend that the railroad company, by making sales of the land to people who were not settlers, should have it in its power to cause a forfeiture of the grant, and, by consequence, to destroy any interest or expectations of innocent and helpless settlers? Was Congress writing a condition subsequent into the settlers' clause, and thereby frustrating its own purpose and policy? Or was Stanley, in the will which embraced the Ecclesiastical Society within its policy and bounty, imposing a condition subsequent when he forbade a sale of the land by the holders of the legal title?

“The question is,” said the Supreme Court in speaking of the terms of Stanley’s will, “whether these are strict common law conditions annexed to the estate, a breach of which, or of any one of them, will work a forfeiture, defeat the devise, and let in the heir; or, whether they are regulations for the guide of the trustees, and explanatory of the terms under which he intended the estate should be managed, with a view to the greatest advantage in behalf of the society?”



“The difference between the two interpretations and the consequences flowing from them, is very material. As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift; and not only this, but the heirs become seized of the first estate, and avoids, of course, all intermediate charges or incumbrances, and takes also free and clear all the expenditures and improvements that may have been laid out on the property.

“On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it.”

And the court concludes, “that the construction, urged by the plaintiffs, of the will, importing a condition, a breach of which forfeits the devise is not well founded.”

But there is more against the asserted condition in the settlers' clause, than there was in the Stanley case. Congress, in the amendment of April 10, 1869, was not committing itself on the merits of

the dispute between the east side and the west side company. It was according permission, not to the east side company, eo nomine, but to “any railroad company heretofore designated by the legislature of the State of Oregon in accordance with the first section of said Act (Act of July 25th, 1866) to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act.” Then follow the two provisos—not alone the proviso in respect to the settlers, but two provisos. We set them out just as they are printed in the amendatory Act:

*“Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: And Provided, Further, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre.”*

This court will not be asked to say that the word provided, used twice in the same sentence, should be given two different meanings. It was not necessary to use it twice at all. It could have been used once just as well, and the sentence would then have read: “Provided, That nothing herein shall impair any rights heretofore acquired by any rail-

road company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land, and that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

Does the word "provided" import a condition in that context? Does it mean, "on condition"? The amendatory Act, after giving permission to "any railroad company heretofore designated," in the language already quoted, to file its assent in the interior department, goes on to say: "And such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act." Then come the two clauses beginning with the word provided. Substitute the phrase, "on condition," for the term "provided," and see how the statute reads:

"And such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: On condition, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: And



On Condition, Further, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

No congressman, or lawyer, or man on the street who could speak and write English, would have used the phrase "on condition," as introductory to the recital "that nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land." There is nothing like a condition subsequent here. It is plain enough that the introductory word "provided," actually and correctly used in the statute as written, carries here no implication of a condition subsequent. Is a different meaning or purpose to be ascribed to it in the next clause of the same sentence?

In the Act of May 4th, 1870, by which a grant was made in terms to the West Side line, there is also a settlers' clause, but the word "provided" will not be found in that clause, nor any other artificial or technical term available and usual in the expression of a condition subsequent—nothing beyond a simple declaration that the granted land shall be sold only to actual settlers, in the limited tracts, at the specified prices. Section 4, the one in view, reads:

*“And be it further enacted, That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding Two Dollars and Fifty Cents per acre.”*

Congress did not intend that the settlers, under the East Side grant, as amended on April 10, 1869, should be better off, or, for the matter of that, worse off, than the settlers under the West Side grant of May 4, 1870. If the word “provided” was put into the amendment of April 10, 1869, in aid and expression of the intent of Congress to impose a condition subsequent, why not also, or some equivalent term of art, in the Act of May 4, 1870?

There is nothing in the settlers’ clause of April 10, 1869, nor, indeed, in the settlers’ clause of the West Side grant of May 4, 1870, giving the right to re-enter for condition broken. “It may be noted,” says the Court of Appeals of New York, speaking of the deed in *Post vs. Weil*, 115 N. Y., p. 371, “that there is no clause in the deed giving the right to re-enter for condition broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be

defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance, in connection with the circumstances of the case and the intent to be fairly presumed therefrom."

More than this, wherever, in the grant of July 25, 1866, Congress intended to attach the penalty of forfeiture and reverter to the breach of a condition subsequent, it said so in express terms; it did not, as in the settlers' clause, omit to say so, and where Congress intended some penalty, other than the reverter of the estate, for the breach of a given requirement of the grant, like the requirement for the upkeep of the road after completion, it provided, in that event for a temporary sequestration of the railroad and its income, or for the assessment of a pecuniary responsibility not to exceed the value of the granted lands. Sections 6 and 8 are the illustrative sections.

It is enacted in Section 6 that the companies, the California company and the Oregon company, shall file their assent within one year from July 25, 1866, shall complete the first twenty miles within two years, and at least twenty miles in each suc-



ceeding year—final completion to be made on or before July 1, 1875. Here are two requirements,—one, the filing of the assent; and the other, the construction of the road within the stipulated time. Section 8 takes up these two requirements, and for a failure to keep them, avoids the grant and forfeits all unpatented lands to the government. This same section deals with the upkeep of the road after completion, and for a delinquency in that regard attaches a penalty, likewise express in terms but less drastic in quality—the temporary sequestration of the road and its income, and the assessment of a pecuniary responsibility on the company. The language of Section 8 is as follows:

“Sec. 8. *And be it further enacted*, That in case the said companies shall fail to comply with the terms and conditions required, namely by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may

be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act."

The West Side grant of May 4, 1870, is also instructive, in conditioning the estate upon the completion of the construction work within the period designated, and only upon that. Section 6 of this Act reads:

"Sec. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

Whatever restriction, therefore, upon the generality of the grant may be carried by the settlers' clause, the grants to the two companies show, by express terms, the intent of Congress not to revoke the grants except for failure to complete the work within the designated period, and, in the case of the East Side grant, for failure to file the assent within the year. If Congress had intended to attach the same consequence and forfeiture to the settlers' clause, it would have said so. That it did not say so, while saying this very thing industriously and expressly in respect to the failure to construct, makes an apt case of *expressio unius*. The internal evidence of the granting acts themselves is irre-

sistible. In *Deseret vs. Tarpy*, 142 U. S. p. 248, the Supreme Court of the United States said:

“In *Wisconsin Central Railroad Co. v. Price County*, 133 U. S., 496, 507, referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this Court for consideration at different times, and of the title they passed we said: ‘The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant.’ ”

To the point, also, is the recent decision of the Supreme Court of the United States in *Green County vs. Quinlan*, 211 U. S., 582, 594, 595. “It frequently has been the case,” says the court, “that the word condition has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a



covenant or agreement, to be performed independently of the counter obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the result be to disregard the technical meaning of the word condition." Speaking, now, of the omission from one phase of the instrument of language which had been used in another connection to impose a condition subsequent, the Supreme Court used this language: "A consideration of the vote of the county leaves no doubt that that part of it which prescribed the nature of the railroad construction was not a condition. It would have been easy to have postponed the obligation to pay the bonds until the construction had been completed, as desired by the county. Such a provision as that in *Provident Life and Trust Company vs. Mercer County*, 170 U. S. 594, would have been enough. Indeed, the draftsman need not have looked afield. Nothing need have been done except to use the same language with reference to construction which he used in this vote with reference to exoneration from the prior subscription to the stock of another railroad. There he said that the subscription should be 'upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest' until the exoneration had happened. The studied omission of this apt, clear and emphatic language from the part of the vote dealing with the construction of the Cumberland & Ohio Railroad is of controlling significance. If the question rested upon

the comparison of language alone, it would be quite enough to warrant the inference that it was not intended that the condition which was imposed in the one case should be equally imposed in the other."

It would seem unnecessary to labor the point further, but reasons multiply against the condition subsequent. *Nichols vs. Southern Oregon Co.*, 135 Fed., 233, was the case of a land grant by Congress (15 Stat., 340, March 3, 1869) in aid of the construction of a military wagon road from Roseburg, Oregon, to the navigable waters of Coos Bay. The grant was made in the same year in which the East Side grant was amended by the introduction of the settlers' clause. But whereas, in the East Side grant, the settlers' clause is not said to be a condition, either in terms or in effect, now, in this wagon road grant to the State of Oregon, the settlers' clause, introduced by the word "provided" is declared to be "upon the condition" that the land shall be sold to any one person only under the statutory restrictions. The precise language is: "Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and at a price not exceeding \$2.50 per acre." The omission from the settlers' clause in the amendment of April 10, 1869, of the expression "upon the condition," when that expression had been industriously and studiously inserted in the proviso of a land grant made just



a month before, is significant. But the Nichols case goes to another point—that the grantee of the lands was not, by force of the grant, or under the proviso, compellable to make sales of the land at all or to anyone. Nichols contended “that the grant in question is in effect an offer to sell the granted lands, to aid in building the road mentioned, in quantities of not more than one-quarter section to any one person, at \$2.50 per acre, and that the title acquired by the state was upon this trust.” The court said: “The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned as the state should conclude to sell them. The object to be accomplished in no wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the state has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken advantage of by the United States.”

In *Los Angeles Terminal Co. vs. R. R. Co.*, 136 Cal. pp. 39-40, 44, 48, plaintiff's deed of land to a yacht club provided: “It is hereby covenanted and



agreed by and between the parties hereto, that, in consideration of this conveyance, no saloon business or business of vending malt, vinous, or spiritous liquors, shall ever be carried on in said lot, neither shall said lot be used for any business or store purposes other than for hotel or lodging house or club purposes." The court took this to be a covenant, but not as requiring the yacht club actually to use the land for hotel or lodging house or club purposes. "The covenant," said the court, "was not that the yacht club *would* use it 'for hotel, lodging house, or club purposes,' for any time or at all." And again: "No easement in favor of other land of the plaintiff was created by the covenant. It compelled no use of the land by the covenantor for any purpose, and conferred no right upon the owner of other lands in respect to the land granted."

Indeed, while the government has argued for a special purpose in the Oregon land grant, looking to the distribution of the land, by sales in small parcels at low prices to settlers, it has not been argued by the government—to the contrary, it has been admitted and affirmed—that the railroad company was not compellable, under the settlers' clause, to make sales to settlers at all. Sales to settlers may be made by the railroad company, but they are not mandatory, the thing is optional and permissive to the grantee. The railroad company may or may not do that thing, but the grant has not been coupled with the necessity for doing it, and it is not made

to depend upon it. These are not the features of a condition subsequent. In *Stuart vs. Easton*, 170 U. S., p. 401, the Supreme Court of the United States reviews the case of *Methodist Church vs. Public Ground Co.*, 103 Pa. St. 608, and quotes therefrom the language used by Mr. Chief Justice Bigelow in a Massachusetts case, as follows: "We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act by the grantee on which the grant is clearly made to depend."

And the settlers themselves—are they compellable to buy from the railroad company? That is for them entirely a matter of personal inclination and choice. If the railroad company should offer the land for sale along the lines of the settlers' clause, it is purely a matter of option with the settler whether to exercise his privilege or not; and if he fails to exercise it for a reasonable time—and the grant is now nearly half a century old—is the title to this land to be clogged indefinitely by an outstanding, unexercised privilege? In this same Pennsylvania case, reviewed by the Supreme Court of the United States, in *Stuart vs. Easton*, *supra*, the court said: "The obligation which the vendees assumed to furnish water to the vendor was, at the

most, a covenant only. Whether they could ever be called on to fulfill it, depended on whether the vendor should avail himself of the privilege of erecting a hydrant. It was purely optional with him whether or not to exercise that right. If he failed to do so within a reasonable time, it would be against public policy to hold that his unexercised privilege should cast a clog on the title for an indefinite time."

Again, certain purposes are specified in the Oregon land grant, which inure specially to the benefit of the grantor—the United States government. Under Section 5 of the Act of July 25, 1866, the companies—California company and Oregon company—"shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph lines for the government of the United States, when required so to do by any department thereof, and the government shall at all times have the preference in the use of said railroad and said telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service."

Further, in Section 5, it is provided: "Said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States, and the same shall be transported over said road at the



cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." And Section 8 provides: "In case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the land granted by this act."

But the settlers' clause was put into the amendment of April 10, 1869, for the sake of the settlers; it inures peculiarly to their benefit—so much is clear, and such is the position taken by the government in this case. *U. S. vs. Des Moines Navigation & Railway Co.*, 142 U. S. 510, 538, 539, 540, is illustrative. Congress, on August 8, 1846, made a land grant to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river. Subsequently, by conveyance of May 3, 1858, from the Governor of Iowa, then a state, title to something over 266,000 acres of the granted land passed to the Navigation and Railway Company. The validity of that title was affirmed by the Supreme Court of the United States. The court found "a concurrence of opinion on the part of the Supreme

Court of Iowa and this court for a quarter of a century in favor of the validity of the title acquired by the Navigation Company. It would seem as though the period of rest as to the question of title ought by this time to have been reached."

The opinion by Mr. Justice Brewer proceeds: "But the government is the complainant, induced doubtless to bring this suit by the act of the legislature of March 28, 1888, which purports to relinquish for the State its trust and to reconvey to the United States all its right and title to these lands, as well as by the urgent appeals of the settlers, and the claim is, that its presence as a party introduces new questions into the litigation, questions not at all affected by the prior decisions. It is the original grantor, and its contention is that while the title of its grantee may be unassailable by other persons, it has the right to challenge it because the grant was made in trust for a specific purpose, and that trust has not been properly executed, nor the lands appropriated to the purposes thereof. That the proposition of law which underlies this claim is correct, cannot be doubted. The grantor of lands conveyed in trust may be the only party with power to complain of the breach of that trust, or on account of such breach to challenge the title in the hands of the trustee or others holding under him; and the title conveyed, voidable alone at its instance, may be good as against all the world besides."

The court goes on: "While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defence on the ground of laches or limitation, *United States, v. Nashville, Chattanooga &c. Railway*, 118 U. S. 120, 125; *United States v. Insley*, 130 U. S. 263; yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defence of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties."

And finally: "We should be closing our eyes to manifest facts if we did not perceive that the government was only a nominal party, whose aid was sought to destroy the title of the navigation company and its grantees, in order to enable the settlers to perfect their titles, initiated by settlement and occupancy; and in that event, the delay of thirty years is such a delay as a court of equity forbids."

So far, then, as the settlers' clause is concerned, and any rights or privileges which it may imply, the government of the United States is a nominal party—the real parties in interest are the settlers, and they are here, in this record, by hundreds and thousands. If the proviso of April 10, 1869, is



an invitation to settle, it is extended to the general public from whom the settlers are drawn; it inures to the benefit of the public generally. A proviso of that kind is not a condition subsequent.

In *Greene vs. O'Connor*, 18 R. I., 57, 59, 60, Clarke and Greene had granted a strip of land to the City of Providence, Rhode Island, by deed containing the following clause: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway and for no other purpose."

"Nor do we think," says the Supreme Court of Rhode Island, "that the clause quoted created a condition subsequent. Conditions subsequent, as is well understood, are not favored in law. A deed will not be construed to create an estate on condition unless language is used which according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. If it be doubtful whether a clause in a deed be a covenant, or a condition, courts will always lean against the latter construction."

The court continues: "The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to wit, as a public highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not

carried out, nor does it reserve to the grantors and their heirs the right, in that event, to reenter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public and not one enuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

Finally: "It matters not that the statement of the purpose for which the land was conveyed is, as in the present instance, in the form of a condition. The employment of apt words to create a condition does not necessarily and invariably have that effect; for these may give way to the intent of the party as ascertained by a construction of the instrument. *Sohier v. Trinity Church*, 109 Mass. 1, the clause in the *habendum* declaring the purpose of the conveyance was 'in trust, nevertheless, and upon condition always,' etc., and it was held that though the words 'upon condition' were appropriate to create a condition, they did not of necessity have that effect, and did not in that case."

It is now submitted, as beyond doubting, that the settlers' clause is not a condition subsequent. There is no room here to invoke the rule that, where a legislative grant is of doubtful scope (*Ry. Co. v. Oregonian R. Co.*, 130 U. S., p. 26) a con-

struction should be adopted favorable to the interests of the public. Nor would this rule help the case of the government. From whatever point of view, the Oregon land grant should not be subjected to illiberal construction at the expense of the railroad company. That was not the spirit or the consideration moving the grant. The difficulties and hazards of the enterprise are portrayed in the opinion of the Supreme Court of the United States in the Union Pacific case, 91 U. S., 72, and in *Platt vs. Union Pacific R. R. Co.*, 99 U. S., 48; and are realized to the full in the story of railroad construction in Oregon, as told by this record, a story of stormy and disastrous years to which the turning point is given by the intervention of the Southern Pacific Company. The Oregon land grant was not a donation or a charity. It was taken on valuable consideration and at tremendous risk; it wrecked fortunes and careers; it brought bankruptcies and reorganizations in its train. "Reasons of economy," said the Supreme Court in the Union Pacific case, "suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements." And again: "It is true, the scheme contemplated profit to individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise." And still again: "The primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to



an end,—the securing a road which could be used for its own purpose.” In the Platt case, the Supreme Court said: “The adventurers who obtained the charter and who accept it undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent they cannot throw off the obligation they have assumed.” And again: “The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made, the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864 additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness—the all-absorbing earnestness—with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in *United States v. Union Pacific Railroad Co.* (91 U. S. 72), to which we refer. Suf-

fice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise."

Beyond all this, we have called attention to the special purposes and considerations, expressed on the face of the granting Act in Sections 5 and 8, and inuring to the benefit of the government of the United States. (U. S. v. R. Co., 98 U. S., pp. 613-614) The railroad companies assumed all that obligation. As the Platt case says, "they cannot throw off the obligation they have assumed." And they are within the right of this case, on the broadest view of the matter, in appealing to the just and reasonable rule of the Supreme Court in the case of United States vs. Denver & Rio Grande Railway Company, 150 U. S. 1, 14:

"It is undoubtedly, as urged by the plaintiffs in error," says the court, "the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. Peter Railroad v. Barney*, 113 U. S. 618, 625, Mr.

Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

But the question here is in briefer compass. It is not a question of the general scope of the grant,



of the consideration passing from the government to the grantee, and whether that consideration should be restricted in favor of the grantor, or liberally construed, in the special circumstances, in favor of the grantee. It is a later and an ulterior question, it is a question of condition subsequent. After this grant has been ascertained by the rules of construction, whether liberal or illiberal, the question then comes up of forfeiting that grant, whatever it is and such as it has been found or made to be by construction. The benign, consistent, and settled rule then applies, that if, on any reasonable construction the estate, such as it is, can be saved from forfeiture, such interpretation will be indulged.

“We are of the opinion,” says the Supreme Court of Iowa in *Courtright vs. Railway Co.*, 35 Iowa 397, “that benefits to result to the Government from a particular construction must not determine the proper interpretation of the law. The Government would doubtless be benefited by restrictions and limitations upon the grant which would operate to defeat it, but this fact should rather weigh against such a construction than in its support. These views are not in conflict with the rule recognized in *Dubuque & Pacific R. R. Co. v. Litchfield*, 23 How., 66, cited by defendants’ counsel, to the effect that in construing a legislative grant, if the words fairly admit of different meanings, that one must be adopted which is most favorable to the interests of the public.”

In the case of *New York Indians vs. United States*, 170 U. S., pp. 25-6, it was said by the Supreme Court: "But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture. *Jones on Real Prop.* Secs. 678, 679."

This was the case of a public grant. But an attempt has been made to parry the force of the case by suggesting a new and special doctrine for conditions subsequent when imposed on Indians—a sort of differential tenderness of construction. The court does not say anything of that kind, it does not intimate it. Instead of putting Indian conditions into a class by themselves, it lays down, in general terms, the well-settled rule of a construction against forfeiture, and cites *Jones on Real Property*. The author, at the place cited, uses

this language, and it is the language carried word for word into the opinion of the Supreme Court:

“678. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee.

“679. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture.”

Davis vs. Gray, 16 Wall., 203-4, 229-230, was also the case of a public grant, a land grant to a railroad company, and it was in speaking of such a grant that the Supreme Court of the United States said: “Conditions subsequent are not favored in the law.” Morgan vs. Rogers, 79 Fed., 578, 579, was concerned with “the act of congress of May 21, 1872, to enable the city of Denver to purchase certain land in Colorado for cemetery purposes, and authorizing the mayor of the city of Denver to enter the designated 160 acres at the land office at the minimum price, to be held and used as a burial place by said city and vicinity,” and it was held that the Act of Congress “did not operate to annex any condition to the grant so authorized.” The court said: “Conditions subsequent are not favored, and the terms used must clearly show that it was intended that the grant



should be on condition, or they will not be construed to have that effect." When the question whether the Act of Congress in the Morgan case should be construed as a condition subsequent, came before the Supreme Court of the United States, that court again affirmed the general rule, without making any discrimination between a congressional grant and a private grant. "In view," said the Supreme Court, "of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used, it needs no argument to show that there was no condition or limitation here." (191 U. S., 58)

Judge Cooley has expressed the rule admirably in *Kiefer vs. German-American Seminary*, 46 Mich., 640, a case of a legislative grant to a corporation in aid of construction. "The general rule," he says, "undoubtedly is, that public grants are to be construed strictly as against the grantees. U. S. v. Aredondo, 11 Pet. 544; *Martin v. Waddell*, 16 Pet. 367; *Dubuque, etc., R. Co. v. Waddell*, 23 How. 66; *Baltimore v. Railroad Co.* 21 Md. 50; *Bradley v. Railroad Co.* 21 Conn. 294; *Richmond v. Railroad Co.* 21 Grat. 614; *Delaney v. Ins. Co.* 52 N. H. 581; *La Plaisance Bay Harbor Co. v. Monroe*, Wall. Ch. 155; *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22. The grantee shall take nothing which is not plainly granted, and as is said in the case last cited, 'every resolution which springs from doubt is against' him. But there is

no question in this case in respect to the grant: its terms are clear and precise and its extent undisputed. The controversy arises upon the terms of a restraint imposed by the grant, and which is in the nature of a condition subsequent, and tends to a defeat of the grant by way of forfeiture. If the grant is to be construed strictly as against the grantees, the condition is to be construed strictly against the state; and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made. The purpose of construction is to give effect to an instrument; not to defeat it, (*Rice v. Railroad Co.* 1 Black. 358; *People v. Burns*, v. Mich. 114; *Tabor v. Cook*, 15 Mich. 322;) and in a public grant especially more than in any other, we should expect to find provisions looking to the permanent enjoyment of the right or property granted as against mere technical breaches of contract or condition on the part of the grantee, not tending to defeat the general purpose."

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract"—and the grant here expresses the contract of the parties (*U. S. v. R. Co.*, 98 U. S. pp. 613-614)—"is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done." (*Ins. Co. v. Dutcher*, 95 U. S. p. 273.)

The practical interpretation of the Oregon Land grant, what the parties have done under it, and for the better part of half a century, does not make the proviso of the settlers' clause into a condition subsequent. It appears from paragraph (e) of Item 8, SUBDIVISION VI of the "stipulation as to the facts" in the case at bar, that, prior to May 12th, 1887, the Oregon and California Railroad Company had sold 163,420.28 acres of the granted lands—substantially in the allotments and at the prices of the settlers' clause. Prior also to May 12th, 1887, and between 1871 and 1877, as paragraph (a) of the same item shows, the government patented to the East Side Company, more precisely to its successor, the Oregon and California Railroad Company, 323,078.68 acres of granted land, contiguous to the first 125 miles of railroad. It appears, in the same place, that no further patents, under the East Side grant, were issued until 1893, and, in the following subdivision of the same item, that no patents under the West Side grant were issued prior to 1895. From Item 2, Subdivision VIII of the stipulation, it appears that between 1893 and 1906 the government patented to the Oregon and California Railroad Company 2,422,708 acres of the East Side grant; and between 1895 and 1903, 128,618.13 acres to the same company, of the West Side grant. These patents, it appears from the same item, were not issued at one time, but from time to time between 1893 and 1906, and pursuant to applications made



by the Oregon and California Railroad Company from time to time between 1876 and 1906, a period of thirty years.

While the sales made prior to May 12th, 1887, as just noted, substantially pursued the allotments and prices of the settlers' clause, it appears that from 1894 to 1903, (Item 4 Subdivision VIII) the Oregon and California Railroad Company sold some of its granted lands "to persons not actual settlers in quantities exceeding 160 acres to one person, and at prices exceeding \$2.50 per acre; and in several instances, between the said dates, the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from \$5.00 to \$20.00 per acre, in one instance at \$35.00 per acre, in one instance at \$40.00 per acre, and in one instance a sale of 45,000 acres at \$7.00 per acre was made by the said Company to a single purchaser."

From Item 5 of the same Subdivision, it appears: "The defendant Oregon and California Railroad Company has heretofore made approximately 5,306 sales of its land-grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres."

Item 6 stipulates as follows: "Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of \$2.50 per acre; approximately 478,000 acres of which 524,000 acres were sold since the year 1897; and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser."

The transactions in these granted lands are multiplied by the circumstance that frequently the conveyance of the land was preceded by an executory contract, providing for serial, deferred payments. Item 7 of Subdivision VIII reads:

"Approximately three-fourths, in number, of all sales made since the year 1897, were made by Contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment; many of which sales were still pending under such Contracts on January 1st, 1903, the conveyances under which were executed from time to time after January 1st, 1903, and a considerable number of said Contracts were still pending when this suit was brought."

"Item 8. Of the total sales made as aforesaid, 4508 had been fully executed and conveyances given aggregating 740,002.45 acres at the time the

said printed Joint and Several Answer was filed; and at said time 571 executory Contracts were still pending, aggregating 81,684.31 acres."

When the Joint and Several Answer was filed in this case, "there remained (Subdivision IX, Item 1) unsold of said granted lands, 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented unto the Oregon and California Railroad Company under the said land-grants, and 284,876.36 acres thereof at that time remained unpatented; all of which unsold lands are claimed by the said Oregon and California Railroad Company under and by virtue of the said land grants."

This is what the parties have done under the grants. It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, of notoriety, of public record; the railroad knew them, the people knew them, the government knew them. The mortgaging, and the public record of that transaction, was plain notice to the government that the lands were being held for sale, and were covenanted to be sold in quantities and at prices satisfactory to the trustee for the bondholders, and that the proceeds of these sales were to be applied in redemption of the construction mortgage. Public and record notice of that provision was conveyed to the government



upon the face of the mortgage of 1887, to the Union Trust Company of New York, given to refund the construction debt and to secure outstanding bondholders who advanced, in good faith, \$17,745,000 (Subdivision VII, Item 19) and whose rights of lien are sought to be forfeited and confiscated in this proceeding. Can the government or did the government "close its eyes to manifest facts" (U. S. v. Navigation & Railroad Co., 142 U. S. p. 540)—to the mortgages and the sales, the executory contracts and the conveyances of these granted lands, extending over the greater part of fifty years? Was Congress unaware of the action of the President and of the Land Department in consistently patenting these lands all along to the railroad company? "Undoubtedly," said the Supreme Court of the United States in U. S. v. Northern Pacific R. Co., 177 U. S. 441, 442, "there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action but from non-action in the special circumstances disclosed."

"We do not think," said the same court in *Deseret v. Tarpey*, 142 U. S. p. 253, speaking of the provision of the Act of Congress requiring the payment of the costs of survey and the patent fees

by the Railroad Company on application for a patent—"We do not think the provision was designed to impair the force of the operative words of transfer in the grant of the United States, or to invalidate *the numerous conveyances by sale and mortgage of the lands made by the Railroad Company with the express or implied assent of the Government.*"

The situation, for all these years, "must have been well known to Congress," and if it was one making for a forfeiture on breach of condition subsequent, it would be "naturally therefore a subject for its legislation." (U. S. vs. Winona R. Co., 165 U. S. p. 478.) But this record has more to the point. It appears from Subdivision XXI of the "Stipulation as to the facts," that an Act of Congress was approved June 19, 1878, entitled "An Act to create an Auditor of Railroad Accounts and other purposes." (Item 1.) The Act of March 3, 1881, appropriated moneys for the salaries of the auditor, therein styled "Commissioner of Railroads", and his assistants, and for travelling and other expenses, and incidental expenses of the office—in all, \$17,100 for the fiscal year. (Item 2.) The Act of April 17, 1900, appropriated \$11,420 for the fiscal year, and terminated the office of Commissioner of Railroads as of June 30th, 1901. (Item 3.)

The Act of March 3, 1901, appropriated \$9,220, and continued the office of Commissioner of Rail-

roads until June 30th, 1902, "when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior, together with the records and styles of the office." (Item 4.) The Act of June 28th, 1903, appropriated \$6,220, and postponed the termination and transfer of the office of Commissioner until June 30th, 1903. (Item 5) The Act of March 3, 1903, appropriated \$6,220, and once more postponed the termination and transfer of the office, this time until June 30th, 1904. (Item 6.)

As appears from Item 7, "pursuant to the requirements of the said Act of June 19th, 1878, the forms of reports to be made by the Railroad Companies contemplated by the said Act, including the defendant Oregon & California Railroad Company, were prepared and adopted and transmitted to the said Railroad Companies, including the defendant Oregon and California Railroad Company, by the said Bureau, from 1879 to 1903; and the defendant Oregon & California Railroad Company complied with the provisions of the said Act, and the demands of the said Bureau, as to the making of said reports, continuously from 1879 to 1903, both years inclusive, as is hereinafter set forth."

These reports are set out in Item 8 of Subdivision XXI. They begin with the half year ending December 31st, 1879, and continue, without break, from year to year, to and including the



year ending June 30th, 1903. Take the first report for instance:—

(1st) For the half year ending December 31st, 1879:

Total cash receipts from all sales to date. \$83,579.93

Average price per acre for all sales to date .....	2.23
--	------

Average price per acre for all sales during half year .....	2.39
---	------

Average price per acre for all purchases to date .....	2.48
--	------

Maximum price per acre from sales (not town lots) .....	15.00
---	-------

Minimum price per acre from sales (not town lots) .....	0.25
---	------

Maximum price per acre now asked (not town lots) .....	7.00
--	------

Minimum price per acre now asked (not town lots) .....	0.25
--	------

Average price per acre now asked (not town lots) .....	2.50
--	------

It thus appears from this first half yearly report, of December 31st, 1879, that the average price per acre was under \$2.50; that the maximum price per acre from sales was in excess of \$2.50 per acre, and that the maximum price asked per acre also exceeded \$2.50 per acre. The same is true for the half year ending June 30th, 1880; also for December 31st, 1880, for June 30th, 1881, for December 31st, 1881, for June 30th, 1882, for

December 31st, 1882, for June 30th, 1883. For the year ending June 30th, 1884, while the average price per acre for all sales to date is under \$2.50, the average price for all sales during the year is slightly in excess, being \$2.725; while the maximum per acre received and asked exceeds \$2.50. The same is to be said for the year ending June 30th, 1885, except that the average per acre for all sales during the year is a trifle lower, \$2.5608. For the half year ending December 31st, 1885, we have the same thing except that the sale price during the year averages \$2.65; and for the year ending December 31st, 1885, it averages \$2.70, for the half year ending June 30th, 1886, \$2.99; for the half year ending December 31st, 1886, \$2.99; for the year ending December 31st, 1886, \$2.99; for the half year ending June 30th, 1887, \$3.19; for the half year ending December 31st, 1887, \$3.40; and for the year ending December 31st, 1887, \$3.24. The maximum prices, both received and asked, will be understood, as this enumeration goes on, unless otherwise specified, to be in excess of \$2.50. For the year ending December 31st, 1888, the average price per acre for all sales to date, now exceeds \$2.50, being \$2.58, while the average acre price for the sales during the year is \$3.74; the corresponding figures for the year ending June 30th, 1889, are \$2.642 and \$4.96; for the year ending June 30th, 1890, \$3.146 and \$6.32; for the year ending June 30th, 1891, \$3.33 and \$4.92; for the year ending June 30th, 1892, \$3.61 and \$5.61;

for the year ending June 30th, 1893, \$3.66 and \$4.51; for the year ending June 30th, 1894, \$3.63 and \$2.83; for the year ending June 30th, 1895, \$3.40 and \$3.49; for the year ending June 30th, 1896, \$3.40 and \$3.57; for the year ending June 30th, 1897, \$3.40 and \$3.35; for the year ending June 30th, 1898, \$3.41 and \$3.95; for the year ending June 30th, 1899, \$3.75 and \$2.62; for the year ending June 30th, 1900, \$3.77 and \$5.02; for the year ending June 30th, 1901, \$4.076 and \$5.348; for the year ending June 30th, 1902, \$5.00 and \$7.85; for the year ending June 30th, 1903, \$4.73 and \$4.22.

It appears from Item 10 of Subdivision XXI, as follows: "The said Bureau of the Interior Department made annual reports to the Secretary of Interior, as required by the said Act of June 19th, 1878, from 1879 to the termination of said office; which reports were embodied in the annual reports of the Secretary of Interior for the same years, transmitted by him to the President of the United States and by the latter to the two Houses of Congress, and the said Secretary's annual reports were there referred to appropriate Committees and printed as Executive Documents."

The attention of the court is now drawn to Item 11 of Subdivision XXI which sets forth these reports of the Bureau of the Interior Department as they pertain to the Oregon Land grant. This re-



port and information was embodied in the annual reports of the Secretary, as indicated in Item 10, it was transmitted to him by the President, it was transmitted by the President to the two Houses of Congress, and the annual reports of the Secretary went to the proper Committee in House and Senate, and were printed as executive documents. The first report, "For the year 1883, Executive Documents, 2nd Session, 47th Congress, 1882-83, No. 1, Part 5, Vol. 2, page 471," shows land grant sales by the Oregon and California Railroad Company "up to December 31, 1881—date of last report—for an amount aggregating \$309,486.15, at an average price of \$2.25 per acre. The minimum price now asked is 25 cents, the maximum \$10 per acre."

For the year 1886, the report shows 237,773.78 acres sold, with \$384,889.72 received from sales and \$385,647.67 outstanding on time sales; for 1887, 242,516.35 acres sold, received \$407,876.54, outstanding on time \$377,545.36; for 1888, \$254,964.08 acres sold, received \$458,836.01, outstanding on time, including \$91,913.69 interest, \$363,638.95; for 1889, 269,442.88 acres sold, received \$541,650.33, outstanding on time \$394,226.58, of which \$98,992.42 is interest. The statement is then made: "The average price per acre for all sales to date was \$2.64, while the average price for sales made during the year was \$3.96."

For 1890, 225,270.57 acres sold, received \$626,520.03, outstanding on time, \$516,287.66. "Average price per acre for all sales during the year was \$6.32."

For 1891, 298,261.45 acres sold, received \$707,556.88, outstanding on time, including principal and interest, \$603,028.05; for 1892, 340,475.85 acres sold, received \$785,536.79, outstanding on time, principal and interest, \$832,958.98; for 1893, acreage not specified, "that the total cash receipts from all sales had amounted to \$859,477.34, and that there remained outstanding on account of time sales the sum of \$861,923.64, principal and interest. The receipts of the Land Department for the year were \$73,940.55, and the expenses \$75,570.07," as "the report of the company shows."

For 1894, "the Company submits the following report on June 30, 1894, of the operations of its Land Department to date:

	Acres
Acquired by United States patent.....	615,555.58
	Acres
Disposed of for cash.....	201.93
Disposed of on time contracts.....	17,299.27
	<hr/>
	17,501.20
	<hr/>
Balance owned by Company.....	598,054.38

“The Company also reports that the total cash receipts from all sales to date amounted to \$909,-008.59, and that there remained outstanding on account of time sales the sum of \$891,905.60, principal and interest. The receipts during the year were \$49,525.25, and the expenses \$55,449.08.”

For 1895, acreage acquired by patent 1,163,-073.56, disposed of for cash and on time 381,402.78 acres; total cash receipts from all sales to date, \$946,952.81, outstanding on time, principal and interest, \$700,064.64; receipts during the year, \$37,747.22, expenses \$59,294.90. The statement is then made: “The average price per acre for all sales to date had been \$3.40, and the average price now asked is \$3.00.”

For 1896, “The records of the General Land Office show that to June 30, 1896, there had been patented to the Company 2,180,366.07 acres. The Company reports that to June 30, 1896, it had received by patent from the United States, 2,397,-717.17 acres of land, and there had been disposed of for cash and on time contracts 387,119.43 acres, leaving the balance owned by the Company, 2,010,-657.74 acres.” The total cash receipts from all sales to date \$986,605.69, outstanding on time, principal and interest, \$875,146.35, deficit in operations of company’s land department during year, \$81,770.68. The statement is then made:

“Average price per acre received was \$3.57.

“Average price per acre now asked, \$3.00.”



For 1897, records of General Land Office to June 30, 1897, show acreage patented to the company, 2,287,131.66. Report of company to same date show patents received from government for 2,503,754.59 acres; disposed of for cash and on time (not including cancelled contracts) 383,443.44 acres; total cash receipts from all sales to date, \$1,020,329.75, outstanding on time, \$775,881.34; receipts for year, \$33,724.06, expenses, \$60,012.11. The statement is then made: "The average price per acre now asked for land is \$3.00."

For 1898, Company reports to June 30, 1898, patents received, 2,561,685.30 acres; sold for cash and on time 504,606.53 acres; total cash receipts from all sales to date, \$1,069,513.25, outstanding on time, \$792,990.38; receipts for year, \$49,183.50, expenses, \$73,183.06. The statement is then made: "The average price per acre now asked for land is \$3.00."

For 1899, Company reports to June 30, 1899, patents received, 2,659,300.56 acres; total cash receipts from all sales to date, \$1,234,225.97, outstanding on time, \$734,957.16; receipts for year \$164,712.72, expenses, \$77,138.22. The statement is then made: "The average price per acre now asked for land is \$3.00."

For 1900, Company reports to June 30, 1900, patents received, 2,787,363.55 acres; total cash receipts from all sales to date, \$1,542,728.71, out-

standing on time, \$1,189,918.71; receipts for year \$308,502.74, expenses, \$91,932.33. The statement is then made: "The average price per acre now asked for land is \$3.00."

For 1902, Company reports to June 30, 1901, patents received, 2,795,567.64 acres; total cash receipts from all sales to date, \$1,852,756.51, outstanding on time, \$1,808,935.66; receipts for year \$310,027.80, expenses, \$72,713.77. The statement is then made: "The average price per acre now asked for land is \$3.50."

For 1903, Company reports to June 30, 1903, patents received, 2,928,809.55 acres; sold for cash and on time 1,032,591.47 acres; total cash receipts from all sales to date, \$2,735,532.88, outstanding on time, principal and interest, \$2,800,637.57; receipts for year, \$437,471.63, expenses, \$105,936.96. The statement is then made: "The average price per acre now asked for land is \$4.73."

Further, it appears from item 12 of Subdivision XXI as follows:

"The Commissioner of Railroads appended to several of the reports set forth in the next preceding 'Item 11' hereof, a copy of the said Acts of Congress approved July 25th, 1866, April 10th, 1869, and May 4th, 1870; for greater particularity as to the reports in which said Acts of Congress are set forth, all parties may refer to the said official published reports."

The Land Department, then, the President, the two Houses of Congress, all were apprised through the years, and from year to year, even from half year to half year, of the transactions and dealings of the company in the granted lands, of the sales made, whether for cash or on time, of the acreage disposed of, of the moneys received and outstanding, and of the average price. No condition subsequent was said to have been broken, no forfeiture was charged or attempted, the patents issued continuously and consistently. Is there anything of a fair argument left, that, by the practical interpretation of the parties themselves, government, railroad-company, bondholders, purchasers, the general public, a condition subsequent was understood or assumed to have been imposed on the grant by the proviso in the settlers' clause? Whatever may be the scope and effect of the proviso as a contract or covenant, it is not a condition subsequent; and covenant is the precise characterization given to the proviso by the Commissioner of the General Land Office in his report for 1906, and again by the Commissioner of the General Land Office, soon to become Secretary of the Interior, in his communication of 1907 to the representative in Congress from the State of Oregon. The report of the Commissioner for 1906,—“it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons—the officers concerned are usually able men and masters of the subjects, not unfrequently they are the draftsmen of the laws they are



afterwards called upon to interpret," *Hastings vs. Whitney*, 132 U. S. p. 366,—proceeds at pages 21 and 22 as follows:

"The grant to the Oregon and California Railroad Company, under the Act of July 25, 1866, embraced 3,821,901.80 acres. The prescribed conditions of the grant not having been met by the company, the time for performance was extended by the Act of April 10, 1869. Although the company failed to comply with the terms of the grant within the time specified, it complied with them substantially before a forfeiture, and title to all the lands consequently vested in the company (see *Schulenberg v. Harriman*, 21 Wall., 44), subject only to the *covenant* expressed in the proviso of the Act of 1869, which declares that the lands granted by the Act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre."

On March 19, 1907, Commissioner of General Land Office Ballinger, afterwards Secretary of the Interior, writes to Hon. W. C. Hawley, representative in Congress from the State of Oregon, as follows:

“Department of the Interior.

“General Land Office, Washington, D. C.

“March 19, 1907.

“Honorable W. C. Hawley, House of Representatives——

“Sir: In reply to your letter of the 7th inst. addressed to the Secretary of the Interior, and handed to me for attention, you are advised that the Act of 1866 made a grant of lands to the California and Oregon Railroad Companies conditioned upon the performance of certain acts by the company within a specified time. The prescribed conditions not having been met by the company, the time of performance was extended by the Act of 1869 and, although the company failed to comply with the terms of the grant before the time specified they were subsequently complied with before a forfeiture, and title to all the land within the grant consequently vested in the company (See *Schulenberg v. Harriman*, 21 Wall., 44), subject only to the *covenant* expressed in the proviso contained in the Act of 1869, which declares that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter-section to one purchaser, and for a price not exceeding \$2.50

per acre. As soon as the title vested in the company, the jurisdiction over the lands passed from the executive branch of the Government, and the enforcement of the provision rests with the courts, through appropriate action by either the settlers entitled to purchase or by the government acting through the Department of Justice." The Commissioner goes on to say that in his judgment the power of Congress to prescribe the proviso cannot be questioned, and he puts it on the ground that the proviso "was made in consideration of the extension of time granted to the company."

"The company," he adds, "is therefore without authority to sell the lands to any other person, in any other amount, or for a greater price than prescribed in the proviso; and any conveyance which the company has attempted to make on a sale made in violation of the statute would not be sustained by the courts. Since title passed from the Government, subject only to the *covenants* created by the proviso, it is doubtful if Congress has power to enact any law to compel a compliance with the terms of the provision, and the *covenant* can only be enforced in the courts." It should be held, therefore, we respectfully submit, that the settlers' clause does not impose a condition subsequent.

We are now to look at the question of condition subsequent from another and independent point of view.



The West Side Company, it has been seen, had filed its assent under the Act of July 25, 1866. The legislature of Oregon, finding that the West Side Company lacked the corporate status required by the granting Act, receded from its designation of that company, and, on October 20th, 1868, designated the East Side Company. The time to file the assent under Section 6 of the Granting Act of July 25, 1866—"one year after the passage hereof—" had passed. Congress, in the amendment of April 10, 1869, refrained from taking sides in the controversy between the two companies. The amendment is worded "so as to allow *any* railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act; *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to grant of land."

There is clear recognition here, by Congress, with the two companies in its eye, that some rights, under the granting Act, had been acquired by one

or other of the two companies. The West Side Company had filed its assent within the year. Whatever rights the West Side Company acquired under the granting Act did not depend on any further and additional filing of assent, and passed to the East Side Company, or its successor, Oregon and California Railroad Company, under the terms of the deed of October 6, 1880, made part of the bill as Exhibit C. If, on the other hand, the East Side Company acquired any rights under the granting Act, its attitude in respect to the congressional permission to file assent, whether in seeking that permission or in acting upon it, and whether inadvertent, or prudential, did not affect its vested right as by an estoppel. (*Bybee v. Oregon & California R. R. Co.*, 139 U. S. 663; S. C., 26 Fed., 591); and it was provided in the amendment itself of April 10, 1869, "that nothing herein shall impair any rights heretofore acquired by any railroad company under said Act."

Now, the Act of July 25, 1856, as the Supreme Court has frequently held, was a grant in *præ-senti*. Of this very Act, it was said by the Supreme Court of the United States in the *Bybee* case just cited: "The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect *in*

*praesenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the Secretary of the Interior. The act then operates as a grant of all odd-numbered sections within the limits, except so far as they may have been in the meantime 'granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of.' "

But the Act of July 25, 1866, so far as the Oregon company was concerned, contemplated a future grantee—"such company organized under the laws of Oregon as the legislature of said state shall *hereafter* designate." "If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently." (Hall v. Russell, 101 U. S. pp. 509-510.) As the Supreme Court said in the case just cited, where the grantee of the Act was a settler, "the Act of Congress made the transfer only when the settler brought himself within the description of those *designated as grantees*." The East Side Company was designated as grantee by the legislature of Oregon on October 20, 1868. At that date, therefore, the Act of Congress made the transfer.

It is true, the granting Act, in Section 6, required the filing of assent within one year; and Section 8 provided that, in the event of a failure in this



regard, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States."

As to the unpatented lands, therefore, from the point of view of the filing of assent, the grant was made on a condition subsequent but it was none the less a grant in praesenti, qualified by the futurity of designation, and the company, when designated, "took the title upon the terms, conditions and restrictions expressed in the Act of Congress."

(*Railroad Land Co. v. Courtright*, 21 Wall., p. 316; *Schulenberg v. Harriman* id., p. 62.) A breach of this condition subsequent would not have the effect, *ipso facto*, of divesting the title of the railroad company; unless the government saw fit, as it had not seen fit by April 10, 1869, to assert its right to enforce a forfeiture for such breach, the title remained unimpaired in the railroad company. "It is settled law," said the Supreme Court of the United States in *Schulenburg v. Harriman*, 21 Wall., p. 63, "that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine

obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." In the case of a private grant, the right to resume the estate "must be asserted by entry or its equivalent; if the grant be a public one—it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement." (*Schulenburg v. Harriman*, *ubi supra*.) And the Supreme Court went on to say in the *Schulenburg* case: "In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

Now, then, the question here is not one of contract or covenant—not simply whether Congress, after having made the grant and passed the title, could or did, on April 10, 1869, in return for per-

mission to file assent, take from the company a contract or covenant to sell the granted lands to actual settlers, in small lots, at statutory price. The real question here is, whether Congress, after having made the grant and passed the title, certainly not later than October 20, 1868, could, in the absence of proceedings, judicial or legislative, to forfeit that grant, and while the title "remained unimpaired" in the company, annex to the grant a condition subsequent by the amendment of April 10, 1869?

The Act of July 25, 1866, was, of course, the grant of an estate on condition subsequent. Annexed to that grant, part of it, in the same instrument and conveyance, certain conditions subsequent had been annexed to the estate. They were, in the language of the law, conditions in deed. But the settlers' clause of April 10, 1869, was not one of them. That came afterwards, after the grant had been made, after the title had passed, after the estate upon condition had been created. "An estate on condition," says Tiffany, *Modern Law of Real Property*, sec. 64, "is one which *by the terms of the instrument by which it is created*, is subject to a contingency not forming a part of the limitation of the estate, it being an estate on 'condition precedent' if it is to begin or 'vest' on the happening of a contingency, and an estate on 'condition subsequent' if it is to terminate thereon, at the option of the creator of the estate or his successor in interest, before its natural time for termination."



This is the statement of an elementary rule. "Estates upon condition," says Blackstone, (Book II, p. 152) "are of two sorts:

1. Estates upon condition *implied*.
2. Estates upon condition *expressed*."

He goes on to explain that "estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexed hereto a secret condition that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him and to grant it to another person."

Now, as to conditions in deed: Blackstone says, *ubi supra*, "An estate on condition *expressed in the grant itself* is where an estate is granted, either in fee-simple or otherwise, with an expressed qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either precedent or subsequent."

Kent says in his Commentaries, 4 Kent, 122:

"Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or

enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed.

1. Of conditions in law.—Estates upon condition in law are such as have a condition impliedly annexed to them, without any condition being specified in the deed or will. If the tenant for life or years aliened his land by feoffment, this act was, at common law, as we have already seen, an implied forfeiture of the estate, being a fraudulent attempt to create a greater estate than the tenant was entitled to; and the reversioner might have entered, as for a breach of the condition in law.”

He proceeds:

“2. Of conditions in deed.—These conditions are *expressly mentioned in the contract between the parties*, and the object of them is either to avoid or defeat an estate; as if a man (to use the case put by Littleton) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and hold the land free of the feoffment.”

Washburn says, in his book on real property, section 935: “An estate upon condition is one which may be created, enlarged, or defeated, by the happening or not happening of some contingent event. *A condition is a qualification or restriction annexed*

*to a conveyance, and so united with it in the deed as to qualify or restrain it."*

The conclusion is inevitable, passing now any questions of contract or covenant, that Congress did not, in the amendment of April 10, 1869, annex a condition subsequent to an estate which had been transferred by the granting Act of July 25, 1866, to a grantee in whom the title vested not later than October 20, 1868. If the government has any rights or remedies in the premises, it must look elsewhere than to the breach of a condition subsequent for their basis.



## III

CONGRESS WAS WITHOUT LAWFUL AUTHORITY ON APRIL 10, 1869, (16 STAT. 47) TO ANNEX A NEW CONDITION, BY AMENDMENT OR OTHERWISE, TO THE LAND GRANT MADE BY THE ACT OF JULY 25, 1866, (14 STAT. 239) AS AMENDED BY THE ACT OF JUNE 25, 1868, (15 STAT. 80) FOR THE FOLLOWING REASONS:

(1) THE CALIFORNIA & OREGON RAILROAD COMPANY FILED ITS ASSENT WITHIN ONE YEAR AND COMPLETED THE "FIRST SECTION OF TWENTY MILES OF SAID RAILROAD" WITHIN TWO YEARS AFTER THE PASSAGE OF THE ACT OF JULY 25, 1866.

(2) THE OREGON CENTRAL RAILROAD (EAST SIDE) COMPANY WAS NOT IN DEFAULT ON APRIL 10, 1869.

*The Act of July 25th, 1866.*

The printed "Stipulation as to the Facts," filed on January 31st 1913, is hereinafter cited as the "Stip." (Vol. IV, pp. 1552-1732 Transcript of Record)

It is therein agreed that the Act of Congress approved July 25th, 1866, "*became operative*" on the day of its approval (Stip. Subd. II Item 1); and that said Act is correctly copied on pages 5 to 10 of the Bill (Stip. Subd. II Item 2).

The said Act is entitled "An Act granting lands to aid in the construction of a *railroad* and telegraph line from the Central Pacific railroad in California to Portland, in Oregon." (Bill Vol. I, p. 6 Transcript of Record) (Brief pp. 988 et seq. , Appendix)

The *first section* of the Act authorized the California & Oregon Railroad Company "and such Company organized under the laws of Oregon as the Legislature of said State shall hereafter designate", to construct "*a railroad* from Portland in Oregon to the Central Pacific railroad in California; the California Company to construct "that part of the *said railroad*" in California and the Oregon Company to construct "that part of the *said railroad*" in Oregon; *provided* that either Company "shall have the right" to construct beyond its State line, "until the said parts shall meet and connect and the whole line of "*said railroad* shall be completed." ( Bill Vol. I, p. 6 Transcript) (Brief pp. 998-9 , Appendix)

*Section 2* provides "That there be, and hereby is, granted to the said Companies, their successors and assigns, for the purpose of aiding in the construction of *said railroad*"; the lands granted to be "applied to the building of *said road* within the States, respectively, wherein they are situated."

*Section 3* makes a right of way and station-grounds grant.

*Section 4* provides, "that whenever the said Companies, or either of them, shall have twenty or more consecutive miles of *any portion of said railroad*" completed, three Commissioners shall be appointed to examine the same and report to the President, "and thereupon patents shall issue to said Companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of *said railroad*."

*Section 5* requires that “the *said railroad*”, after construction, be kept in repair and use, for the benefit of the United States, and so forth.

*Section 6* requires the “*said Companies*” to file their assent to the Act, in the Interior Department, within one year after the passage thereof; “to complete the first twenty miles of *said railroad*” within two years, at least twenty miles each year thereafter, and the whole thereof on or before July 1st, 1875; and that “the *said railroad* shall be of the same gauge as the Central Pacific railroad of California, and be connected therewith.”

*Section 7* requires that “the *said railroad*” be operated and used as “one connected and continuous line.”

*Section 8* provides, “that in case the *said Companies*” fail to file their assent or to construct the railroad as provided in *Section 6* of this Act, “this Act shall be null and void, and all the lands not conveyed by patent to *said Company* or *Companies*, as the case may be, at the date of any such failure, shall revert to the United States.”

*Section 9* provides that the *said Companies* shall be governed by the general railroad laws of their respective States; and that the word “*Company*” or “*Companies*” shall be construed to embrace the words “associates, successors and assigns”.

*Section 10* reserves mineral lands, other than iron and coal lands, from the land-grant.

*Section 11* provides that the *said Companies* shall be governed by statutory regulations



respecting right of way over private lands, wherever "the *said road*" shall pass over such lands.

*Section 12* provides "That Congress may at any time, having due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal," the Act. (Bill Vol. I, p. 13, Brief , pp. 1004 Appendix)

*The Act of June 25th, 1868.*

It is agreed that the said Act of July 25th, 1866, was amended by an Act of Congress approved June 25th, 1868, entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon. (Stip. Subd. II, Item 3); and that the said amendatory Act is correctly copied on page 10 of the Bill (Stip. Subd. II, Item 4).

The amendatory Act provides that Section 6 of the said Act of July 25th, 1866,

"be so amended as to provide that instead of the times now fixed in said Section, the first section of twenty miles of *said railroad* and telegraph shall be completed within eighteen months from the passage of this Act, and at least twenty miles in each two years thereafter, and the whole on or before" July 1st, 1880. (Bill Vol. I, pp. 13-14 Transcript. Brief p. 1004-5, Appendix)

## I.

*The California & Oregon Railroad Company filed its assent within one year, and completed "the first section of twenty miles of said railroad" within two years, after passage of the Act of July 25th 1866.*

The Act of July 25th 1866, authorized "the construction of a railroad from the Central Pacific railroad in California to Portland, in Oregon."

The "Central Pacific railroad in California", referred to in the Act of 1866, is that part in California constructed by the Central Pacific Railroad Company, of the continuous, trans-continental, railroad from the Missouri River via Ogden, Sacramento, Stockton and San Jose to San Francisco—which railroad was constructed under Act of Congress approved July 1st, 1862 (12 Stat. 489), known as the Union Pacific-Central Pacific Act; the Union Pacific having constructed that part of the railroad from the Missouri River West to Ogden, and the Central Pacific that part extending from San Francisco East to Ogden.

In the case of *United States vs. Union Pacific*, 91 U. S. 79, considering the situation out of which the Union Pacific-Central Pacific Act arose and the purpose of Congress in passing it, Mr. Justice Davis, in delivering the opinion, said:

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which

existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise."



Section 12 of the Union Pacific-Central Pacific Act, before the Supreme Court in the above-mentioned case, provides that "The track upon the entire line of railroad and branches shall be of uniform width, \* \* so that, when completed, cars can be run from the Missouri River to the Pacific Coast" the entire line of railroad to be used "as one connected, continuous line". Section 6 of the Act of 1866, referring to the railroad it authorizes the construction of, requires that "the said railroad shall be of the same gauge as the Central Pacific railroad of California, and be *connected* therewith"; and Section 7 of the Act of 1866 requires that the said railroad be operated and used "as one connected and continuous line".

From which it is apparent that the railroad contemplated and provided for, by the Act of July 25th 1866, was intended as a branch, or extension, of the trans-continental Union Pacific-Central Pacific railroad, to be used and operated in connection with it as one continuous line, connecting the East with the West at San Francisco and Portland; and it follows that the same purpose of binding "together the widely separated parts of our common country, and furnishing a cheap and expeditious mode for the transportation of troops and supplies", which the Supreme Court found, in the above-quoted opinion, to have actuated Congress in passage of the Union Pacific-Central Pacific Act, also actuated Congress in passage of the July 25th 1866 Act.

The first Section of the July 25th 1866 Act, like Section 10 of the Union Pacific-Central Pacific Act, authorized either Company named to construct the entire railroad.

Section 6 of the Act of 1866 requires "That the said Companies file *their assent*" within one year. construct the first 20-mile section "of *said railroad*" within two years, and at least 20 miles each year thereafter; and Section 8 provides that forfeiture of the land-grant shall follow failure to file assent, or complete construction, as required by Section 6. There can be no question, however, but that, notwithstanding Section 6, literally construed, by use of the words "*their assent*" called for a joint assent, had the California Company filed its separate assent in time and constructed the entire railroad before declaration of forfeiture for failure to construct in time, it would thereby have earned the entire land-grant; especially had the Oregon Legislature failed to designate a Company to construct the Oregon portion of "*said railroad*."

The California & Oregon Railroad Company's assent of date October 8 1866 to the Act of July 25th 1866 (the first Section of which Act, it will be remembered, authorized that Company to construct the entire railroad was filed with and accepted by the Department of Interior in October 1866 (Vol. 13 p. 6783 Transcript—Defendants' Exhibit 284); and that Company completed construction of the "Said railroad" from connection with the Central Pacific railroad, at Roseville

Junction, to Lincoln October 24th 1867, to Wheatland October 28th 1867, and to Yuba September 19th 1868 (Vol. V, pp. 2087-8)—all prior to passage of the Act of April 10th 1869; the distances being, from Roseville Junction to Lincoln 10.4 miles, Lincoln to Wheatland 11.1 miles, Wheatland to Yuba 10.1 miles (Vol. V, pp. 2087-8)—in all 21.5 miles within two years after passage of the Act of July 25th 1866, and 31.6 miles prior to passage of the Act of April 10th 1869 and prior to designation of the East Side Company by the Oregon Legislature.

In other words: The first Section of the Act of 1866, in effect, authorized the California & Oregon Railroad Company, a corporation then in existence, to construct any part or all of "*the said railroad*", provided the Oregon Legislature failed to designate a Company, or such Company failed to file its assent in time. As to the California Company, then in existence, Section 2 of the Act made a present grant of the odd-sections within the limits therein specified, along the line of "*said railroad*" (from Roseville Junction to Portland); and Section 4 of the Act provided for the issuance of patents for the granted lands as fast as the "*said railroad*" was constructed and accepted. Section 6 imposed conditions subsequent, that assent be filed within one year, and the first 20-mile section of "*said railroad*" (i. e., from Roseville Junction to Portland) be constructed within two years; and Section 8 provided forfeiture for failure to comply with the conditions imposed by Section 6. The



California & Oregon Railroad Company filed its assent to the said Act, and constructed the first 20-mile section of the "said railroad", within the required time—thus perfecting full performance, and rendering the grants made by the Act of 1866 indefeasible for failure to perform conditions required to be performed prior to July 25th 1868; and it is sufficient to say that the Act of June 25th 1868 extended the time for further performance (construction of the second 20-mile section of "said railroad") until December 25th 1871—long after passage of the Act of April 10th 1869.

It is true that on October 10th 1866 the Oregon Legislature adopted and the Governor approved a Joint Resolution designating the West Side Company to construct that part in Oregon of the "Said railroad" (Stip., Subd. III, Item 4, Vol. IV, p. 1555); and that on July 6th 1867 (within the time allowed therefor) the West Side Company filed its assent to the said Act of 1866. If such designation and assent were lawfully made and filed, it follows that the assent of both Companies was filed in time, and the first 20-mile section of "said railroad" was constructed in time—hence, there being no default, Congress was powerless to annex a *new condition* by Act of April 10th 1869; nor was the West Side Company, considered individually and independently of performances by the California Company, in default on April 10th 1869—as it had filed assent in time, and the Act of June 25th 1868 allowed until December 25th 1869 to construct the first 20-mile section of the "said railroad."

The Act of 1866 bid for one railroad connecting the Central Pacific railroad in California with Portland, in Oregon; and construction of that portion of "*said railroad*" within the limits of California, only, would not have served the purposes of the enactment. A railroad commencing at the Central Pacific railroad and terminating at the northern boundary line of California, would have been of no use to the Government—it would not have tended in the slightest degree to connect Portland, in Oregon, with the trans-continental Union Pacific-Central Pacific railroad; and the construction of such a railroad would have been an idle, wasteful expenditure of money by the constructing Company.

Section 12 of the Act of 1866 reserved the right of Congress, "having *due regard for the rights* of said California and Oregon Railroad Companies, to add to, alter, amend or repeal this Act"; but the California & Oregon Railroad Company, having filed its assent and constructed the first 20-mile section of the "*said railroad*" in time, perfected a vested right that the said Act be not repealed, nor altered or amended in any way that would embarrass or defeat construction of the Oregon portion, or any other portion, of the contemplated railroad connecting the Central Pacific railroad with Portland.

Section 2 of the Act recites that the land-grant is made "for the purpose of aiding in the construction of *said railroad*"; which aid was necessarily extended, in fact and as it may be fairly assumed,

to procure construction of the "said railroad"—fairly assumed that such aid was necessary because, otherwise, Congress would not have granted it. As before said, the only conditions imposed by the Act of 1866, upon this aid by land-grant, were the filing of assent within one year, and construction of the "*said railroad*" in 20-mile sections within the periods specified; and the constructing Companies were left free to mortgage or otherwise dispose of the lands, in aid of construction, without any restriction as to persons, consideration price, or land quantities. After performance of all conditions imposed by the Act of 1866 required to be performed prior to April 10 1869, the California Company on April 10th 1869 possessed a *vested right* which cut off the power of Congress to "alter, add to or amend" the Act of 1866 in any way that would tend to embarrass, delay or defeat construction of either the Oregon or California portion of "*said railroad*".

Section 3 of the Union Pacific-Central Pacific Act (12 Stat. 489) provides "That there be, and is hereby granted," the lands "for the purpose of *aiding in the construction of said railroad*"; and the corresponding words of the Act of July 25th 1866 (Sec. 2) are identical.

In *Platt vs. Union Pacific*, 99 U. S. 48-67, speaking of the purpose of Congress in making the Union Pacific-Central Pacific land-grant, and the rights of the grantees under that Act, the Supreme Court said:



“Suffice it to say, the *purpose of Congress*, above all others, was to obtain the construction of the railroad by the corporations it created to undertake the work. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. \* \* The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon construction of the road. *Purchasers could not have been reasonably expected, certainly few for immediate settlement.* \* \* Many persons might be willing to advance money on faith of the prospective value of the lands, *if the railroad was built*, who would not be willing to buy when it was doubtful whether the Company would ever be able to raise the money necessary to build the road and thus render the *lands salable*. (p. 60).

No limitation was set to the quantity of land which the Company might sell to single associations, or single persons. It was at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands, or any lesser quantity, regardless of any general legislative policy.” (p. 65).

The Act of April 10th, 1869, it is claimed attempted to cut off the unrestricted right granted by the Act of 1866 to dispose of the lands in Oregon to aid construction of the Oregon portion of the railroad, by the following proviso:

“And Provided, Further, That the lands granted by the Act aforesaid (the Act of July 25th, 1866) shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty cents per acre.”

Here, as said by the Court in the Platt case (*supra*), speaking of the Union Pacific Act:

“Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for construction of the road (not for paying debts incurred in the construction, but immediate need as the construction was progressing) was to hypothecate them as security for a loan. \* \* \* Congress must have been blind indeed if it did not foresee this, and intend to authorize the use of the lands to raise money *by mortgage* for the object it had so much at heart.” (99 U. S. 60).

Had the sales limitation provisions, to “actual settlers” imposed by the Act of April 10th, 1869, been observed, as now contended, the Oregon portion of the “*said railroad*” would not yet have been constructed; for there were (speaking generally)

no settlers there then, and but few there now, to settle upon or purchase the land—nor does the bill contain any allegation to the contrary.

It is true that construction of the Oregon portion of the "*said railroad*" was aided, largely, by moneys procured under Trust Mortgages covering the Oregon portion of the land-grant (Stip., Vol. IV, p. 1560 Item 1, p. 1563 Item 5, page 1575 Item 21); but the Bill alleges that those Trust Mortgages were "in violation and breach of the aforesaid terms, conditions and provisions" of the Act of April 10th, 1869, in that they purported to convey and authorize the Trustees thereunder to sell and convey the lands "to persons other than actual settlers, and in quantities greater than one-quarter section to one purchaser, and for a price exceeding \$2.50 per acre" (Bill, Vol. I, pp. 36-7-49 Transcript)

The general incorporation laws of Oregon, as they existed in 1866, 1867, 1868 and 1869, constituted Oregon's continuous consent to the construction of railroads in Oregon by Railroad Companies incorporated for that purpose (Act of October 14, 1862, sections 1 to 51, now Lord's Oregon Laws, Sections 6679, 6680, 6681-3-6-7-8-6691-2-3-4-6-7-8-9-6838-9-40-41-42-43-44-45-46-6653 ); and unless and until the Oregon Legislature, in the exercise of the special authority delegated to it by the first Section of the Act of July 25th 1866,



lawfully designated a particular Railroad Company to construct the Oregon portion of the "said railroad", the California and Oregon Railroad Company (or its successor the Central Pacific), had the consent of the Oregon Legislature to construct the same—if not as California corporations, then by the mere filing of Articles of Incorporation in Oregon. It is immaterial to present considerations which, if either, the West Side Company or East Side Company designation, constituted the proper exercise of the authority, as such, delegated by the Act of 1866; if, for no other reason, because either of such designations cut off the opportunity of the California Company to procure the express consent of the Oregon Legislature for it to construct the Oregon portion of the "*said railroad*"—except, of course, by becoming the successor of such designated Company, by transfer of its stock, or conveyance of its rights and property.

As hereinbefore shown, the California & Oregon Railroad Company's assent to the Act of 1866 was filed in October 1866; it completed construction of the first 21.5 miles of the "*said railroad*" from its connection with the Central Pacific railroad at Roseville Junction on October 28th 1867, and the next 10.1 miles of "*said railroad*" on September 19th 1868; and the first 77.6 miles of "*said railroad*", from connection with the Central Pacific to Chico, as constructed by that Company, was finally accepted by the United States authorities in August

1870 (Defendants' Exhibit 285, Vol. XIII, p. 6784)

About December 1867, the principal stockholders of the Central Pacific Railroad Company of California (grantee under the Union Pacific-Central Pacific Acts of 1862 and 1864) became the principal stockholders of the California & Oregon Railroad Company (Stip. Subd. VII, Item 11, Vol. IV, p. 1571 Transcript); and in August 1870 the said California & Oregon Railroad Company became amalgamated and consolidated into the Central Pacific Railroad Company (Stip. Subd. VII, Items 2, 3, Vol. IV, p. 1566 Transcript). The Articles of Amalgamation and Consolidation, after reciting that the California & Oregon Railroad Company was incorporated and organized to construct, maintain and operate the continuous line of railroad from Roseville Junction to Portland, in Oregon, provided for by the Act of July 25th 1866 (Stip. Subd. VII, Item 3, Vol. IV, p. 1566 pp. 1652-62 Transcript), declares that "The object and purpose of said new corporation (Central Pacific Railroad Company) shall be to purchase, construct, own, maintain, and operate all and each of the railroad lines hereinbefore described" (Vol. IV, p. 1656 Transcript).

At the time of said amalgamation and consolidation, the Central Pacific Railroad Company owned the railroad constructed under the Union Pacific-Central Pacific Acts, from Ogden by way of Elko,

Reno, Colfax, Sacramento, Stockton, Niles and San Jose to San Francisco, and the co-terminous land-grant made by the said Acts; and the California & Oregon Railroad Company, at that time, owned the California portion of the land-grant made by the Act of July 25th 1866 (Stip. Subd. VII, Item 4, Vol. IV, pp. 1567-8 Transcript), and theretofore completed construction of its railroad from connection with the Central Pacific railroad at Roseville Junction to Chico (Vol. V, pp. 2087-8, p. 217). Prior to the year 1883 the Central Pacific completed its railroad from Chico northerly to Delta, and during the years 1885, 1886 and 1887 the Pacific Improvement Company under the several contracts hereinafter mentioned (with the Central Pacific as to the California portion and with the Oregon & California Railroad Company as to the Oregon portion) completed the "*said railroad*" by continuous construction work commencing at Delta and extending Northerly to Ashland; the entire construction work (Delta Northerly through to Ashland) having been done by Wm. Hood, then and now Chief Engineer of the Central Pacific, and was paid for as the work progressed, by the Pacific Improvement Company (Vol. IV, pp. 2051-2)

On February 7th 1885 the Central Pacific leased its railroad from Ogden to San Francisco, and from Roseville Junction to Delta, unto the Southern Pacific Company (Stip. Subd. VII, Item 7, Vol. IV, p. 1569 Transcript).



Construction of the Oregon portion of the railroad was subjected to frequent delays, by reason of financial embarrassment and, at times, threatened bankruptcy, of the Oregon & California Railroad Company. In 1870, after considerable financial embarrassment theretofore, the Oregon & California Railroad Company procured \$8,000,000 construction funds, by mortgaging its lands (Stip. Subd. V Item 1 Vol. IV p. 1560 Transcript), which funds became exhausted about January 1873 by the cost of construction, and in consequence further construction was suspended until about June 1881 (Stip. Subd. V, Item 3, Vol. IV, p. 1561); by Trust Deed covering the land-grant, given in June 1881, \$5,000,000 further construction funds were procured, and construction was resumed in June 1881 (Stip. Subd. VI, Item 5, Vol. IV, pp. 1563-4 Transcript), but about January 1884 the said \$5,000,000 fund became exhausted by construction costs, and construction was again suspended; and about January 1885 all property and affairs of the Oregon & California Railroad Company were placed in the hands of a Receiver (Stip. Subd. VI, Item 6 and 7, Vol. IV, p. 1564 Transcript)

On July 31st 1885, the Oregon & California Railroad Company and Central Pacific Railroad Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, pp. 1571-2, pp. 1689-1696 Transcript) by which the Oregon Company agreed to sell and transfer, free of debt, its railroads and

land-grants (less lands sold to that date, "which does not exceed in aggregate 300,000 acres") (Stip., Vol. IV, p. 1690 Transcript), unto the "Appointee" of the Central Pacific, in consideration of (a) 80,000 shares of Central Pacific stock at par value of \$8,000,000, (b) \$10,500,000 in Bonds to be delivered to the Oregon Company secured by Trust Mortgage on the lands and railroads sold including the railroad completed to the South boundary line of Oregon, and (c) completion of the said railroad from Ashland to the South boundary line of Oregon.

On October 11th 1886 the Central Pacific Railroad Company and the Pacific Improvement Company entered into an Agreement (Stip., Subd. VII, Item 12, Vol. IV, pp. 1571-2, and Vol. II, pp. 949-56 Transcript) which, briefly stated, makes the following recitations, covenants and agreements:

*Recites* that the Central Pacific is successor in interest of the California & Oregon, and has completed construction from connection with the Central Pacific railroad at Roseville, Junction to Delta, of the railroad provided for by the Act of July 25th 1866; that the Oregon & California Railroad Company is in "an embarrassed condition" and unable to complete the Oregon portion of the said railroad; that until the whole of said railroad connecting Portland with the Central Pacific railroad is completed no part of the said railroad can be profitably operated, nor can the Government use the same for transportation of troops and

soforth; that completion by the Central Pacific of the uncompleted portion in California of the said railroad "without assurance of the completion of that portion of the road from Portland to said (California) boundary line would be a waste of money;"

"Now, THEREFORE, For the purpose of completing the said railroad as a through line from Portland to and connecting with the Central Pacific railroad at Roseville Junction, thus connecting San Francisco, Ogden and the Union Pacific railroad East from Ogden, with Portland, the following *covenants and agreements* are made:

*First:* The Pacific Improvement shall construct and fully equip the said railroad from Delta to the Oregon-California boundary line as soon as the Oregon & California railroad is completed to that line:

*Second:* The said railroad construction to be subject to the approval of the President or Chief Engineer of the Central Pacific; the Chief Engineer's salary to be paid by the Central Pacific:

*Third:* The Pacific Improvement Co. to pay costs and expenses of purchasing and acquiring right of way;

*Fourth:* The Pacific Improvement Co. will "within a reasonable time", purchase the whole, or a majority, of the shares of Capital Stock of the Oregon & California Railroad Co., and complete the Oregon portion of the said railroad to connection with the Central Pacific railroad;

*Fifth:* The Central Pacific "will upon exe-



cution of this Agreement issue and deliver to the Pacific Improvement Co. 80,000 shares of its Capital Stock; and for construction of the California portion of the said railroad will pay the Pacific Improvement Co. \$4,500,000—part thereof when  $\frac{1}{2}$  of the railroad from Delta to Oregon is completed, and the other  $\frac{1}{2}$  thereof when the entire railroad between said points is completed.

Pursuant to the provisions of the Contract of March 28th 1887 (Ex. E to Bill, Vol. I, pp. 166-184 Transcript), on or about May 12th 1887 all of the Capital Stock of the Oregon & California Railroad Company was assigned and delivered to the Pacific Improvement Company (Stip. Sub. VII, Items 13, 14, Vol. IV, pp. 1572-3 Transcript), in consideration and exchange for the 80,000 shares of Central Pacific Stock referred to in the before-mentioned Agreements of July 31st 1885 and October 11th 1886; and the Pacific Improvement Company held the said Capital Stock of the Oregon & California Railroad Company from May 12th 1887 until April 9th 1901—on which last-mentioned date it assigned and transferred the same to the Southern Pacific Company (Stip. Subd. VII, Item 15, Vol. IV, p. 1573 Transcript). The Pacific Improvement Company also agreed, in the said Contract of March 28th 1887 (as Stockholder of the Oregon & California Railroad Company), to execute and deliver unto the Union Trust Company (a party to the Contract) a Trust Mortgage

covering the lands, railroads and all property of the Oregon & California Railroad Company, to secure the payment of Mortgage Bonds to be issued by the Union Trust Company and guaranteed by the Southern Pacific Company, to be used for the redemption of the then outstanding Mortgage Bonds and indebtedness of the Oregon & California Railroad Company, and the remainder to be used for completion of the railroad from Ashland to connection with the Central Pacific railroad (Bill, Vol. I, pp. 48-49 Transcript). The Agreements of this Contract were carried out by the execution and delivery of the Trust Mortgage from the Oregon & California Railroad Company to the Union Trust Company, dated July 1st 1887 (Stip. Subd. VII, Item 16, Vol. IV, p. 1573 Transcript); and the Bonds issued thereunder were used in part to discharge the Oregon Company's debts as agreed in the Contract of March 28th 1887, and the balance was used to complete the construction of said railroad (Stip. Subd. VII, Items 20, 21, Vol. IV, pp. 1574-5 Transcript).

By Agreement dated June 6th 1887, between the Oregon & California Railroad Company and the Pacific Improvement Company, the Pacific Improvement Company agreed to construct and equip the Oregon portion of the said railroad, from Ashland to connection with the Central Pacific railroad, near the State line, for the consideration price therein set forth (Stip. Subd. VII, Item 24,

Vol. IV, pp. 1576, 1697-1702 Transcript); and during the year 1887 the Pacific Improvement Company constructed that portion of the said railroad extending from Delta, in California, to Ashland, in Oregon (Stip. Sub. VII, Item 24, Vol. IV, p. 1576 Transcript). On July 1st 1887 the Oregon & California Railroad Company leased its Oregon railroad to the Southern Pacific Company, and on January 1st 1888 the Central Pacific leased unto the same Company its railroad from Delta North to connection with the Oregon & California railroad; and the Southern Pacific has ever since operated the said continuous railroad from Portland to the Roseville Junction, and from there Westerly to San Francisco and Easterly to connection with the Union Pacific railroad at Ogden (Stip. Subd. VII, Items 8, 9, 10; Vol. IV, pp. 1569-1571 Transcript).

*In conclusion:* The following is a brief summary of the foregoing statement of facts, coupled with the conclusions which flow therefrom:

(a) The Act of July 25th 1866 provided for the construction of "*a railroad*" from the Central Pacific railroad to Portland, to be of the same gauge as and to be connected with the Central Pacific railroad, and to be operated as one continuous line of railroad (Sec's 1, 6 and 7); and the said Act authorized and empowered the California & Oregon Railroad Company, therein described as the Company "organized under an Act of the State of Cali-



fornia to protect certain parties in and to a railroad survey to connect Portland in Oregon with Marysville (on the line of said railroad as constructed, and about 33 miles North of Roseville Junction) in California", to construct the California part of "*said railroad*" and "to continue in constructing the same" beyond the California boundary line, "with the consent of the State" of Oregon, to Portland or until it met and connected with a railroad (if any) constructed by an Oregon Company designated by the Oregon Legislature (1st Sec.).

(b) The said Act, "for the purpose of aiding in the construction of *said railroad*", made a land-grant of twenty odd sections "per mile (ten on each side) of *said railroad*" (Sec. 2); and the only *conditions* imposed, upon the franchise to construct and maintain the railroad or receive the land-grant, are, "That the said Companies shall file their assent to this Act in the Department of Interior within one year after the passage hereof, and shall complete the first section of 20 miles of said railroad within two years, and at least twenty miles in each year thereafter" (Sec's 6 and 8).

(c) In October 1866 the California & Oregon Railroad Company's assent to the said Act was filed with and accepted by the Interior Department (Def'ts' Ex. 284, Vol. XIII, p. 6783 Transcript); and on July 6th 1867, the Oregon Central Railroad Company (West Side) filed in the same office its assent to the said Act, together with a certified copy of the Joint Resolution of the Oregon Legislature,

adopted and approved on October 10th 1866, designating "the Oregon Central Railroad Company, a Company organized under the general incorporation laws" of Oregon, "as the Company which shall be entitled to receive the land granted and all the benefits in Oregon of the Act of Congress approved July 25, 1866" (Stip. Subd. II, Items 4, 5, Vol. IV, p. 1555 Transcript). From which it appears that both Companies filed "their assent to this (July 25th 1866) Act within one year after the passage thereof" (Sec. 6); hence there was no default, on April 10th 1869, *for failure to file assent*.

(d) Congress, conscious that the said assents had been filed in time, on June 25th 1868 passed an Act amending Section 6 of the Act of July 25th 1866 so as to allow until December 25th 1869 to construct the first 20-mile section of "*said railroad*"—without requirement for filing of further assent. This date (December 25th 1869) it will be observed, is *subsequent* to the Act of April 10th 1869; from which it follows that, had neither Company constructed any railroad prior to April 10th 1869, still there would have been no default on April 10th 1869, *on account of failure to construct*.

(e) However, the California & Oregon Railroad Company actually constructed the first 20-mile section of the "*said railroad*" within the time allowed therefor by the Act of July 25, 1866, but failed to report the construction, or to ask acceptance thereof, until after passage of the Act of June 25th 1868

granting further time; at the time of which acceptance the California Company had 77.6 miles of the "*said railroad*," connecting with the Central Pacific at Roseville Junction and extending North to Chico, satisfactorily constructed and equipped. In other words, the California Company constructed sufficient railroad prior to April 10th 1869, to save breach of condition for failure to construct, down to December 24th 1875; but, as before said, the time to construct the first 20-mile section did not expire until December 24th 1869—more than eight months *after* passage of the Act of April 10th 1869.

(*f*) The Act of July 25th 1866 constituted the owners offer to dispose of the lands described upon terms and conditions expressly stated in the Act, namely: filing of assent and construction of the railroad, within the times fixed therefor. The California Company specifically and fully performed those conditions (in so far as they were required to be performed prior to December 24th 1875), at its own great cost and expenditure of money; hence the California Company had a vested right, on April 10th 1869, that the integrity of the Act of 1866 be preserved—and that the said Act be not so altered or amended as to in anywise lessen, or diminish, the present or prospective value of the benefits promised by that Act.

(*g*) The purpose of Congress, in passing the Act of 1866 was to procure the construction of a continuous railroad of the same gauge as, and connecting Portland with, the Central



Pacific railroad—thus establishing a continuous trans-continental railroad, over which cars carrying Government troops and provisions, could be transported from the East at the West end and to Portland at the North end. A railroad commencing at Portland which did not extend to nor connect with the Central Pacific railroad, or which commenced at the Central Pacific railroad and did not extend to Portland would not, for obvious reasons, fulfill the purposes of Congress in passing the Act; and the construction of such a road would be a wasteful expenditure of money. The California Company, therefore, having fully performed and expended a substantial sum of money in constructing and equipping the Southern part of "*said railroad*", was legally and equitably entitled that the Act of 1866 remain intact, unshorn of benefits offered by it—to the end that the full measure of subsidy offered by the Act to aid construction, both in Oregon and California, remain free and open to realization; a right, in other words, that sale of the lands granted in aid of construction be not restricted or limited to a particular class of persons, nor as to sale price per acre, nor as to quantity salable to one person.

(h) While the general incorporation laws of Oregon, at the time the Act of July 25th 1866 was passed and continuously since (Lord's Oregon Laws, Sec's 6679 to 6702), constituted the continuing general consent of the Oregon Legislature to the construction of railroads in Oregon by any incorporated Rail-

road Company, special designation by the Oregon Legislation, first of the West Side Company and thereafter of the East Side Company, cut off the general consent that any Company other than the specially designated Companies construct the particular road covered by such designations; hence the only way, after the said special designations were made, that the California & Oregon or its successor the Central Pacific could continue the construction of the "*said railroad*" into Oregon, was by continuing such construction in the name and as the work of the designated Company—which necessitated the purchase by the Central Pacific (acting through the Pacific Improvement Company) of the Oregon Company's Capital Stock.

(i) The Oregon & California ceased construction, for lack of funds, from about January 1873 until about June 1881 (Stip. Subd. V, Item 3, Vol. IV, p. 1561 Transcript), thereafter from January 1884 until about April 1887 (Stip. Subd. VI, Item 6, Vol. IV, p. 1564 Transcript), and in January 1885 all property of the Oregon & California Railroad Company was placed in the hands of a Receiver (Stip. Subd. VI, Item 7, Vol. IV, p. 1564).

On July 31st 1885 the Oregon & California Railroad Company and Central Pacific Railroad Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, p. 1571, pp. 1689-1696 Transcript) by which the Oregon Company agreed to sell and transfer all its property, free of debt, to the Central Pacific "Appointee" to be thereafter designated, in consideration of 80,000 shares of Central Pa-

cific Stock and \$10,500,000 in new Bonds to be secured by Mortgage on all Oregon & California property; the new Bonds (presumably) to be used in redeeming and paying the then outstanding Mortgage Bonds and indebtedness of the Oregon Company—presumably to be so used because of the agreement to sell and transfer the property free of debt.

On October 11th 1886 the Central Pacific Railroad Company and Pacific Improvement Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, pp. 1571-2, Vol. II, pp. 949-56 Transcript) in which, after reciting the financial inability of the Oregon & California Railroad Company to complete construction of the Oregon part of the "*said railroad*" and that without completion of the entire railroad from the Central Pacific railroad at Roseville Junction to Portland all expenditures made and to be made in constructing the California part of the "*said railroad*" were wasteful and useless, the said Companies mutually agreed that the Pacific Improvement Company would purchase the Capital Stock of the Oregon & California Railroad Company and cause the "*said railroad*" to be completed so as to connect Portland with the Central Pacific railroad, in consideration of 80,000 shares of Central Pacific Stock (to be exchanged for the Oregon & California Stock), and \$4,500,000 to be paid for construction of the uncompleted part of the Central Pacific railroad; the effect of which Agreement was, among other things, to constitute the Pacific Improvement Company the "Appointee" of the



Central Pacific, provided for in the said Agreement of July 1st, 1885.

On March 28th 1887, the Oregon & California Railroad Company Stockholders and Bondholders' Committees of that Company, The Pacific Improvement Company, Southern Pacific Company and Union Trust Company, entered into an Agreement (Stip. Subd. VII, Item 13; Vol. IV, pp. 1572-3; Vol. I, pp. 168-85 Transcript) by which the said Stockholders' Committee agreed to sell all or substantially all Capital Stock of the Oregon & California Railroad Company unto the Pacific Improvement, in consideration of and exchange for 80,000 shares of Central Pacific Capital Stock; and the Bondholders Committee agreed to exchange the \$10,500,000 then outstanding Oregon & California Mortgage Bonds for new Bonds to be issued under a Trust Mortgage to be given by the Oregon & California Railroad Company unto the Union Trust Company with payment guaranteed by the Southern Pacific Company—the old Bonds to be delivered to the Southern Pacific Company (Bill, Vol. I, pp. 43-166-184 Transcript).

Pursuant to the last-mentioned Agreement all of the Capital Stock of the Oregon & California Railroad Company was, on or about May 12th 1887 assigned and delivered to the Pacific Improvement Company; and at the same time the said old Mortgage Bonds were transferred and delivered to the Southern Pacific Company (Stip. Subd. VII, Item 14, Vol. IV, pp. 1572-3 Transcript).

About August 1st 1899 the Southern Pacific

Company became the owner of the Capital Stock of the Central Pacific Railroad Company (Stip. Subd. VII, Item 11, Vol. IV, p. 1571 Transcript); and on April 9th 1901 the Pacific Improvement Company assigned and transferred the Oregon & California Capital Stock to the Southern Pacific Company.

Presumably, however, the Pacific Improvement held the Oregon & California Capital Stock in trust for the Central Pacific, down to the time the Southern Pacific became owner of the Central Pacific—especially as the Oregon & California Capital Stock was surrendered to the Central Pacific and the certificates of Central Pacific Stock therefor were issued directly by the Central Pacific unto the persons entitled thereto by such exchange (Bill, Vol. I, p       ).

Furthermore Congress by the Act of June 15, 1866 (14 Stat. 66) enacted a statute that is in harmony with the settled policy of the country, as evidenced by the land grants to Union Pacific Railway Co. in 1862 and in 1864, and like regulation granting lands to Central Pacific Railroad Company in 1862. This statute may well be called the National Charter of American Railroads. It provided that every railroad company in the United States whose road is operated by steam, its successors or assigns should be and was thereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation there-

for, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. As said by Mr. Judson in his work on Interstate Commerce, Sec. 40, p. 51, "The purpose of this act, as declared by the Supreme Court was to remove trammels upon transportation which had previously existed, and to prevent the creation of such trammels in the future, and also to be a declaration by congress in favor of the great policy of continuous lines".

*Railroad Company vs. Richmond*, 19 Wallace 584

*Union Pacific Railway Company vs. Chicago, etc., Railway Company*, 163 U. S. 565 and 589

*Bowman vs. C. & N. W. Railroad Company*, 125 U. S. 465.

In *Union Pacific Railway Company vs. Chicago, etc., Railway Company*, 163 U. S. 565 and 589, Chief Justice Fuller speaking for the Court, after quoting the Act of June 15th 1866, now Sec. 5248 of Revised Statutes, says: "It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is effectuation of that policy that such business arrangements as will make such connections effective are made".

If it was competent for Congress to pass the Act of April 10th 1869, thereby placing upon the lands granted by the Act of July 25th 1866 within the State of Oregon the restrictions contained in the actual settler clause, the



enforcement thereof would in effect destroy the right of the California & Oregon Railroad Company to construct this continuous line to Portland and earn the grant under the original Act and free from the restrictions of the actual settler clause.

If Congress cannot, in view of the policy thus evidenced by the Act of July 25th 1866 impose this limitation upon any part of these lands, it must necessarily follow that whether the lands were earned by either company or both is immaterial. The condition is in violation of the contract right created by the Act of July 25th 1866.

A complete summary of the evidence to be considered under this point will be found at pages 269-77, this brief, and special attention is also called to letter of July 16, 1868, from A. M. Loryea to O. H. Browning, Secretary of the Interior, of date July 16, 1868, Vol. XIV, pp. 7439, showing acceptance of Act of July 25th, 1866, by East Side Company, and also Vol. X, pp. 5023-5028, showing acceptance of Act of July 25th, 1866, by East Side Company, on November 25, 1868, after its designation by Oregon Legislature October 20, 1868, and before the passage of the Act of April 10, 1869.

It is thus seen that prior to the passage of the Act of April 10th 1869 the East Side Company was the owner of a vested estate in the grant made by the Act of July 25th 1866; and there remained only the question as between the West Side Com-

pany and the East Side Company as to which was the legally designated beneficiary of the grant; that is, whether the West Side Company had been legally designated under the Joint Resolution of October 10th 1868, and, if not so legally designated, as to whether the East Side Company had been legally designated under the Joint Resolution of October 20th 1868. It will be remembered that the East Side Company commenced actual construction on April 16th 1868 and continued such construction in sections, so that by September 1868 various portions of the line were under construction as far south as Salem, the capital of the State, and the tracks had been laid through Oregon City (Defendants' Exhibit 367, Volume XVIII, page 9028; Defendants' Exhibit 371, Volume XVIII, page 9030; testimony of Joseph Gaston, Volume V, page 2442; testimony of George H. Himes, Volume V, page 2443; testimony of J. C. Moreland, Volume V, page 2461). That on April 29th 1868 the East Side Company adopted a resolution accepting the grant of July 25th 1866 and empowered A. M. Loryea to present a duly certified copy thereof to the proper authorities to be filed as certified by S. A. Clarke, Secretary of the East Side Company, under date of April 30th 1868 (Volume XIV, pages 7454); and, in connection therewith, adopted a resolution appointing A. M. Loryea agent and representative of that Company April 15th 1868 (Volume X, pages 4934-8); and that A. M. Loryea on July 16th 1869 (Volume XIV,

page 7454) wrote a letter to Secretary Browning, which the latter acknowledged in his letter of July 17th 1868 (Volume XIV, page 7440).

It will also be remembered, that on November 25th 1868 the East Side Company (Volume X, page 5023-5026) adopted a formal resolution assenting to the Act of July 25th 1866 and appointing J. H. Mitchell to act as attorney for the East Side Company, to go to Washington, D. C., and represent the Company in all of its legal matters. At that time the East Side Company had been legally designated by the Joint Resolution of October 20th 1868. It was legally incorporated on April 22nd 1867. Congress had by the Act of June 25th 1868 disposed of the filing of assent and had continued the time for the construction and completion of the first 20 miles of the road and construction and completion of the entire road. The Act of June 25th 1868 operated as a waiver of the necessity for the filing of assent by the newly designated Company, known in this record as the East Side Company. Congress at that time knew that the East Side Company was engaged in actual construction work and that on July 23rd 1868 the first 150 miles of its line were under contract and construction and that the work thereon was proceeding from Portland as far south as French Prairie, in which the town of Woodburn is now located. Congress also knew that the West Side Company was claiming to be legally designated and was pushing



its construction work for the purpose of earning the grant, and Congress also knew that the West Side Company had filed its assent within the time and that the East Side Company had not been at that time legally designated by the Legislature, but was claiming to be entitled to the benefit of the grant, and that its articles of incorporation of date April 22nd 1867, authorized under the Code of 1862, was a continuing consent upon the part of the State of Oregon and a designation of the State of Oregon, under its joint statute relating to the incorporation of railroad companies, and that the articles of incorporation of the East Side Company aptly appropriated or indicated its intention to construct the road required to be constructed under the Act of July 25th 1866. In this situation, it must also be borne in mind that the California and Oregon Railroad Company was designated in the Act of July 25th 1866 as a corporation already in existence that would take the grant in California, and under certain conditions would be the grantee as to that portion of the grant in Oregon. There was therefore a grantee or beneficiary to take the grant of July 25th 1866 in esse from the date of the Act of Congress; and the objection that the East Side Company was not in esse and as such designated is without force, in view of the legally designated beneficiary, the California and Oregon Railway Company, named in the Act of July 25th 1866, with the contingent right to become the beneficiary and grantee of the lands

granted, which were situated in Oregon. That right was defeated by the designation of the East Side Company by the Legislature of Oregon under the Resolution of October 20th 1868, and the authority that had vested contingently in the California and Oregon Railroad Company passed over to the East Side Company, and that Company, as we have seen, accepted the grant by actual construction and therefore filed its assent. The filing of its assent after the Act of June 25th 1868 was a wholly unnecessary thing to do, so far as any rights were thereby secured; and the failure to file any assent after the passage of the Act of June 25th 1868 had no possible effect in that situation. The Act of April 10th 1869 was passed over the objections of the West Side Company and, as the report of the Judiciary Committee of the Senate in reporting the bill shows, the object of that legislation was to permit the East Side Company (not by name or in fact) to file its assent—not for the purpose of vesting title in that Company, but for the purpose of bringing the East Side Company into clear relation to the grant and its claims thereto, so that the contest between the East Side Company and the West Side Company could be judicially determined. As the Act of April 10th 1869 passed the Senate, the actual settler clause was not found therein, but it was added in the House. In that situation, the most that could be claimed for the proviso is that, if there was a consideration for the promise or contract, the East

Side Company by filing its assent thereafter agreed with United States that it would sell these lands to actual settlers. In other words, it made a promise that it would file its assent, accepting the provisions of April 10th 1869, by which it covenanted with the United States and with no one else, and by which the East Side Company was personally bound to see that these lands were sold to actual settlers. This was a personal promise which did not run with the land, did not affect its title and which, if broken by the East Side Company prior to issuance of patent, could have been remedied by the Land Department refusing to issue patent, because the Company had failed to keep its promise. The president could have refused to accept constructed portions of road or to approve to be patented the lands opposite to, and coterminous with, such constructed portions of road, for the same reason. But when the East Side Company sold this grant to the Oregon and California Railroad Company on March 29th 1870 and the covenant was thereby broken, from that date the Oregon and California Railroad Company was under no obligation as matter of law to observe this proviso. The covenant did not run with the land, the Oregon and California Railroad Company was not a party to the contract and the facts that further construction of the road by said Company was accepted by the President, that lands opposite to and coterminous with the completed sections were approved to be patented, and that patents therefor reg-



ularly issued to the Oregon and California Railroad Company, are persuasive and conclusive evidence that the United States in the execution of this grant and the amendment of April 10th 1869 so construed the operative effect of this actual settler clause. It therefore is conclusive, as it seems to us, that the rights acquired by the East Side Company, prior to April 10th 1869, passed to the Oregon and California Railroad Company, unaffected by the proviso of April 10th 1869, in whatever aspect the case may be considered.

#### IV.

**“THE ACTUAL SETTLERS” CLAUSE IN THE ACT OF APRIL 10, 1869, AND SECTION 4 OF THE ACT OF MAY 4, 1870, (16 STAT. 94) CONSTRUED SO AS TO GIVE POTENT EFFECT TO THE PRIMARY POLICY OF CONGRESS, AND TO CARRY OUT THE PURPOSES OF THE GRANTING ACTS, IN THE LIGHT OF LONG CONTINUED CONTEMPORANEOUS AND PERMITTED CONSTRUCTION OF THESE ACTS, AS EVIDENCED BY THE RECORD, AND SUBSEQUENT LEGISLATION OF CONGRESS RELATING TO LAND GRANTS, AND THE PUBLIC LANDS, DID NOT CREATE A CONDITION SUBSEQUENT. IT WAS NOT THE INTENTION OF CONGRESS TO BURDEN THE TITLE TO THESE LANDS WITH A CONDITION AS TO THEIR SALES WHICH, IF BROKEN AT ANY TIME AS TO A SINGLE SALE, WOULD SUBJECT THE TITLE TO THE ENTIRE GRANT TO FORFEITURE TO THE UNITED STATES. CONGRESS, EVEN THOUGH INTENDING AND EXPECTING THAT THE LANDS COULD AND SHOULD BE SOLD TO ACTUAL SETTLERS, RELIED UPON THE GOOD FAITH AND**

SELF INTEREST OF THE COMPANY TO CARRY OUT ITS POLICY AND DIRECTION IN THAT BEHALF. IF CONGRESS HAD INTENDED THAT THE GRANT SHOULD BE SUBJECT TO FORFEITURE FOR ANY FAILURE TO CARRY OUT ITS POLICY, IT WOULD HAVE USED CLEAR AND APT WORDS TO EFFECTUATE THE SAME. THERE IS NO PRESUMPTION IN FAVOR OF THE UNITED STATES THAT AN ESTATE GRANTED IN FEE SIMPLE SHALL BE DESTROYED BY ANY ACT OF THE GRANTEE WHICH SHALL RE-INVEST THE UNITED STATES WITH TITLE. ESTATES GRANTED BY THE UNITED STATE WILL NOT BE ENLARGED BY CONSTRUCTION, BUT WHEN GRANTED, THERE IS NO PRESUMPTION THAT SUCH ESTATES WILL REVERT FOR ANY CAUSE. THE DESTRUCTION OF THE ESTATE WILL NOT BE FAVORED, WHETHER THE GRANT IS PUBLIC OR PRIVATE.

Section 4 of the Act of May 4, 1870, reads:

“Section 4. And be it further enacted that the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.” (16 Stat. 94)

The proviso of the Act of April 10, 1869, (16 Stat. 47) is as follows:

“And provided further, That the lands granted by the act aforesaid shall be sold to

actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

It will be remembered that the original granting act amended April 10, 1869, was passed July 25, 1866, and that the Oregon Central Railroad Company of Portland (West Side) was designated by the legislative assembly October 10, 1866 as the company entitled to this grant, but that the legislative assembly on October 20, 1868 set aside this action and designated the Oregon Central Railroad Company of Salem as the beneficiary of the act.

It also appears from the testimony that both companies commenced construction of their respective roads in April, 1868, and that construction work of the Oregon Central (West Side) proceeded with more or less interruption, and was engaged in constructing its road up to and on May 4, 1870, and that construction of the railroad of the Oregon Central (East Side) was prosecuted with considerable diligence during 1868 and the first twenty miles of completed road was finished December 25, 1869. The evidence fairly shows that more than one half of the construction work of the Oregon Central (East Side) had been done prior to April 10, 1869.

Bearing in mind that the primary object of both grants was to secure rapid construction of each



road, and that under the act of July 25, 1866 (14 Stat. 239) the first section of twenty miles of the railroad contemplated by that act, extending from Roseville Junction to Portland, was to be completed within two years from July 25, 1866, and at least twenty miles in each year thereafter, and the whole on or before July 1, 1875.

Congress having in mind the insuperable conditions retarding construction, both in Oregon and California, passed the act of June 25, 1868 (15 Stat. 80), amending the act of July 25, 1866, so as to provide that the first section of twenty miles should be concluded within eighteen months from June 25, 1868, and at least 20 miles in each two years thereafter, and the whole on or before July 1, 1880.

It appears from the testimony (Exhibit No. 14 to Stipulation, pages 171, 172, 173, 174, Item 2, subdivision 19, pages 39, 40 of "Stipulation as to the Facts") that the first section of the east side railroad in Oregon was completed December 24, 1869, accepted January 29, 1870; the second, third and fourth sections of 20 miles each were completed in the year 1870 and all accepted February 28, 1871; the fifth and sixth sections of 20 miles each were completed August 11, 1871 and January 13, 1872 respectively, and accepted March 11, 1872; seventh, eighth and ninth sections, a distance of 77.3668 miles were completed in 1872, accepted

July 11, 1878; tenth section of 45 miles, first 28 miles thereof completed and in operation November 1882, and all accepted August 29, 1883; the eleventh section of 100 miles to a point about  $1\frac{1}{4}$  miles south of Ashland completed, from the north end to Glendale, 20 miles, May 14, 1883; from Glendale to Grants Pass, 55 miles, December 4, 1883; to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884; all accepted January 29, 1887; twelfth section, extending from a point  $1\frac{1}{2}$  miles south of Ashland to the Oregon and California state line, a distance of 24.135 miles, completed prior to June 28, 1888, and accepted November 8, 1889.

It is thus seen that the road was constructed from Roseburg south to the California state line after the time specified in the Act of June 25, 1868 and accepted by the President, the last section thereof, over nine years after such date.

The first section of 20 miles of the West Side railroad was completed prior to and accepted February 16, 1872; and the second section extending from the 20 mile post to the Yamhill River, a distance of  $27\frac{1}{2}$  miles, was completed prior to May 3, 1876 and accepted June 23, 1876. This was only a portion of the line contemplated by the Act of May 4, 1870, but this portion of  $47\frac{1}{2}$  miles was completed within the time specified in the Act of May 4, 1870.

By section 8 of the Act of July 25, 1866, it was provided that "in case the said companies shall fail  
"to comply with the terms and conditions required,  
"namely, by not filing their assent thereto as provided in section 6 of this act, or by not completing  
"the same as provided in said section, this act shall  
"be null and void, and all the lands not conveyed  
"by patent to said company or companies, as the  
"case may be, at the date of any such failure, shall  
"revert to the United States. These were both conditions subsequent to the grant. Assent was filed by the California & Oregon Railroad Company, and failure to file assent upon the part of the Oregon and California Railroad Company or the Oregon Central Railroad Company within time was legally waived, if indeed such assent was not evidenced by acts of the Company in commencing construction and subsequently filing such assent.

The second condition subsequent has never been asserted and is, of course, waived, because the road was completed nine years after the time limited in the act of June 25, 1866, but notwithstanding it was so completed after breach of this condition subsequent, the road was accepted and patents directed to be issued.

Furthermore, the act of September 29, 1890 (26 Stat. 46), known as the "general forfeiture" act, is clearly a waiver of the right to forfeit this grant for breach of this condition subsequent.



It will be observed also that there are no words of forfeiture in the actual settlers clause in either the act of May 4, 1870 or April 10, 1869, and that no words of re-entry are used.

In view of the primary purpose of Congress and its anxiety to secure early and prompt construction of these railroads, in view of the action of the President of the United States in accepting these completed sections of road, notwithstanding the Oregon Central (West Side) failed to construct a portion of railroad contemplated by that act, towit, that leading from Forest Grove to Astoria, and notwithstanding the Oregon Central (East Side) failed to construct within time, and in view of the passage of the act of January 31, 1885 (23 Stat. 296) declaring a forfeiture of certain lands granted by the act of May 4, 1870 for failure to construct a railroad from Forest Grove to Astoria, and no claim made then or at any time up to April 30, 1908, as to a breach of the actual settlers clause, and in view of the passage of the "general forfeiture" act of September 29, 1890, forfeiting lands granted to railroad companies opposite to and co-terminous with the uncompleted portions of the railroads contemplated by the grants, and no action taken in respect to the forfeiture of the grant of July 25, 1866 until April 30, 1908 for breach of the actual settlers clause, it is respectfully submitted that in the light of these facts, indicating a settled purpose of Congress, it must be presumed that the parties, the

United States on one side and the companies on the other, construed the actual settlers clause as evidencing a secondary policy. The contemporaneous and permitted construction of these acts, as evidenced by the record, and subsequent legislation relating to land grants and the public lands, clearly indicate that it was not the intention of Congress to create a condition subsequent by the words used in the actual settlers clause. It may have been expected, and doubtless was expected, that the lands could and should be sold to actual settlers, that the construction of the roads would induce settlement and that in this way, the direction evidenced by these words we have quoted, would be observed.

It may be conceded that in construing a grant made by the United States, where such grant does not rest upon pecuniary or valuable consideration, but is a gratuity or gift,—that the grant should be construed in favor of the United States and that nothing will be presumed to have been granted that does not clearly appear to have been intended to be granted.

It may be conceded further that grants made of public lands by the United States to aid in the construction of railroads, should be construed so far as the estate created is concerned, strictly, and that all doubts as to the extent of the estate should be resolved in favor of the United States, unless the intention is clearly expressed, but estates granted by the United States will not be enlarged by con-

struction. When the estate has been granted there is no presumption that such estate will revert for any cause. It is well settled that the destruction of an estate will not be favored, whether the grant is public or private.

These acts of Congress constitute contracts or conveyances by which a present estate was granted to the companies. The estate became absolute and vested in fee simple as to lands within place limits, and acquired precision upon the filing of the map of definite location. There is no presumption that the estate in the circumstances was conditional, or that it was granted upon a condition which might destroy or annihilate the fee.

In *Schulenberg v. Harriman*, 21 Wall. 44, 60, Mr. Justice Field says:

“The language used imports a present grant and admits of no other meaning. \* \* \* \*  
The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

\* \* \* \* \*

“A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.

\* \* \* \* \*

“The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the



road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. In Sheppard's Touchstone it is said: 'If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, &c., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffer shall recipere the land, these are, either of them, good words in a condition to give a re-entry—as good as the word 're-enter'—and by these words the estate will be made conditional.' ”

It will thus be seen that in *Schulenberg v. Harri-*man, there was an express provision by which, upon failure to complete the road, the land should revert, and it was there held that this created a condition subsequent and gave the right of re-entry, provided the grantor, in that case the United States, should see proper to assert this right. It was, as we shall presently show, not a reversion, but a possibility of reverter.

It should be borne in mind, also, that these grants to railroad companies of public lands to aid in the construction of roads, were not gratuities, or donations, or gifts, but were founded upon contracts in which pecuniary considerations were expressed and required to be paid. There was the expected enhancement of the value of the unsold public lands within the limits of these grants, and located outside of the limits of the grant but tributary to the ter-

ritory served by those national highways. It was also required in the act of July 25, 1866 that the companies should transport, free of charge, troops and munitions of war and property of the United States, which, as the testimony shows, has aggregated a very large sum of money.

In such cases the rule of strict construction, even as to the estate granted, is not observed.

In *United States v. Denver & Rio Grande R. R. Co.* 150 U. S. 1, 14, Mr. Justice Jackson, speaking for the court, says:

“It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. Peter Railroad v. Barney*, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: ‘The acts making the grants \* \* \* \* are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.’

“Looking to the condition of the country, and the purposes intended to be accomplished by the

act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley v. New York & New Haven Railroad*, 21 Connecticut, 294; *Pierce on Railroads*, 491."

The case of *Bradley v. New York & New Haven Railroad Co.* 21 Conn. 294, cited by Mr. Justice Johnson, strongly sustains these views.

Bearing in mind this rule thus announced by the Supreme Court of the United States, which must be applied to the question now under consideration, that is, whether the so-called actual settlers clause quoted, creates a condition subsequent, the attention of the Court is called to the rules of law which control and which determine whether particular words used, either in a public or private grant, create a condition subsequent.



In *Stuart v. Easton*, 170 U. S. 383, 397, Mr. Justice White, speaking for the court, says:

“If the grant be viewed as one merely to trustees to hold ‘for the uses and purposes mentioned in the act of the assembly,’ it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that*; *provided*; *if it shall happen*; etc., 4 Kent Com. note b. p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled with any clause of reentry or a provision that the estate conveyed should cease or be void on any contingency. (Ib) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while*; *so long as*; *until*, *during* &c., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.”

In *New York Indians v. United States*, 170 U. S. 1, 24, Mr. Justice Brown, speaking for the court, says:

“In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by

simple executive action to reenter, take possession of the lands and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may reenter in the case of the breach of a condition subsequent, and the Government, which can only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States v. Repentigny*, 5 Wall. 211, 267, in which the court said: 'We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government, without these preliminary proceedings.' Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg v. Harriman*, 21 Wall. 44, 63; in *Farnsworth v. Minnesota & Pacific Railroad*, 92 U. S. 49; and in *Van Wyck v. Knevals*, 106 U. S. 360. In *St. Louis, Iron Mountain &c., Railway Co., v. Magee*, 115 U. S. 469, it was said that 'legislation to be sufficient' (for that purpose) 'must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment

therein establishing the right, it should be direct, positive and free from all doubt or ambiguity.' See, also, *Pacific Railway Co., v. United States*, 124 U. S. 124. As there is no pretence that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the Government.

"But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee.

"A condition will not be extended beyond its express terms to entitle him to a forfeiture. Jones on Real Prop. Secs. 678, 679."

In *Rice v. Railroad Co.*, 1 Black 358, 378, the court says:

"Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute, and every part of it. (1 Kent's Com. 462.) Intention in such cases must govern when it can be



discovered; but in the search for it the whole statute must be regarded, and, if practicable, so expounded as to give effect to every part."

In *Wright v. Morgan*, 191 U. S. 55, 58, Mr. Justice Holmes, speaking for the court, says:

"If the legal title was in the city it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used, it needs no argument to show that there was no condition or limitation here. *Stuart v. Easton*, 170 U. S. 383."

In *Davis v. Gray*, 16 Wall. 203, 232, Mr. Justice Swayne says:

"When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

The cases illustrating what words will create a condition subsequent, also illustrate and enforce the rule that conditions subsequent when created must be strictly construed, and therefore a court of equity will lay hold of circumstances showing impossibility of performance and thereby excusing the breach, or will look with favor upon a state of facts tending to show waiver.

In *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard*, 12 How. 307, 340, Mr. Justice Curtis says:

“The law leans strongly against forfeiture and it is incumbent on the party who seeks to enforce one to show plainly his right to it.”

This rule of strict construction is sustained and fortified where the United States, as here, has permitted the company, from the beginning, to sell its lands without regard to the restrictions or limitations of the actual settler clause, and at most, has permitted the company to follow the construction placed upon the act of April 10, 1869 by the opinion of Mr. Wilson submitted to Attorney General Williams in 1872, that is, to sell to such persons as were actual settlers upon the land on April 10, 1869, and up to the definite location of the line of railroad which was the practice of the company, as testified to by Mr. Loring. Page 371, Vol. V. pp 2196 et seq.

The United States practically acquiesced in this construction, and this should be considered by the court in determining whether the words of the so-called actual settlers clause should be construed to create a condition subsequent, and whether, if they do create a condition subsequent, the United States has treated the condition as impossible of performance, or as having been waived.

In *Hewitt v. Schultz*, 180 U. S. 139, 156, Mr. Justice Harlan, speaking for the court, says:

“It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

“But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas and Smith, and upon which the Land Department has acted since 1888. ‘It is the settled



doctrine of this court,' as was said in *United States v. Alabama Great Southern Railroad*, 142 U. S. 615, 621, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced.' "

The fact that the United States allowed this road to be completed nine years after the time in which it was required to be completed, and that notwithstanding there had been continuous breaches of this so-called condition subsequent, is a strong circumstance indicating acquiescence upon the part of the United States in the construction of the act of April 10, 1869, practically applied by the company in the administration of the grant from the beginning.

In speaking of the condition subsequent created by the act as to construction of road, and construing this grant, Mr. Justice Brown, in the case of *Bybee v. Oregon & California R. R. Co.* 139 U. S. 663, 667, speaking for the court, says:

"A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted lands is manifestly so harsh and unjust, that the breach of such condition ought not to be treated as a forfeiture, unless the language of the act be so

clear and unambiguous as to admit of no other reasonable construction.”

There was an express provision in Section 8 of the act of July 25, 1866, that “all the lands not conveyed by “patent to said company or companies, as the case may be, at “the date of any such failure, shall revert to the United States.” Construing this clear and undoubted condition subsequent, containing express words providing for a reverter to the United States for breach of the condition, the court in the Bybee case expressly ruled that as to lands theretofore patented the act continued in full force and effect. Judge Deady, construing this clause in the court below, said:

“But for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the condition, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of congress in making the grant.”

Bybee v. Ore. & Cal. R. R. Co., 26 Fed. 586, 589.

Mr. Justice Brown quotes with approval this language of Judge Deady and follows same with the statement we have quoted from his opinion.

This rule of strict construction applied to the words of the so-called actual settler clause, would, as it seems to us, indicate that a condition subsequent was not thereby created. But, if it should be

held that in the absence of words of forfeiture and re-entry, and notwithstanding the change of policy of the United States as to the settlement of lands of this class as evidenced by the Timber and Stone Act of June 3, 1878 and the act creating forest reserves, and other like acts, and the act repealing the pre-emption laws passed March 3, 1891, that these words do create a condition subsequent, the authorities justify the contention we make, that the condition should be strictly construed; and if it appears that there was doubt as to its proper construction in the beginning of the administration of the grant and that this matter was presented to the Secretary of the Interior charged with the administration of this act on behalf of the United States, and that no action was taken in contravention of the construction contended for by the company, and that the matter was allowed to rest in abeyance for nearly 40 years, the court would be justified in holding that under these circumstances the language should not be construed to be a condition subsequent, or if bound by technical rules to hold that the words do create a condition subsequent, that then, under the circumstances, the condition should be held to have been discharged because of impossibility of performance or because impracticable on account of the condition of the lands granted and practically impossible of performance; or, if possible of performance, that its breach has been so long acquiesced in as that it has been waived.

It will be helpful to consider the adjudged cases



as illustrating the principles that conditions subsequent are construed strictly.

In *Morrill v. Wabash, St. L. & P. Ry.*, 96 Mo. 174, 179, the court says:

“Again, conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. 4 Kent Com. (10 Ed.) 150. When relied on to work a forfeiture, they must be created in express terms or by clear implication. 1 Wash. on Real Prop. (3 Ed.) 469.”

In *Roanoke Investment Co. v. K. C. & S. E. Ry. Co.*, 108 Mo. 50, 63, the court says:

“Conditions subsequent are not favored in law and are construed strictly, because they tend to destroy estates. Coke, Littleton, 205 b. 219 b. ‘If it be doubtful whether a clause in a deed be a covenant or a condition the courts will incline against the latter construction; for a covenant is far preferable.’ 4 Kent’s Com. 132. The usual words in a condition subsequent are ‘so that’, ‘provided’, the latter according to Lord Coke being the most appropriate.”

In *Farnham v. Thompson*, 34 Minn. 330, 337, the court says:

“Such conditions are not favored in law, because they tend to defeat estates vested, and are in the nature of forfeitures. Therefore it is in such cases a rule recognized by all the authorities that an estate on condition cannot be created by deed, except when the terms of the

grant will admit of no other reasonable interpretation. The intention that the doing, or failing to do, on the part of the grantee, of the acts specified shall defeat the estate must be clearly and unambiguously expressed. No particular form of words is required to create the condition. Certain words have acquired a technical signification as creating such a condition,—such as ‘provided,’ ‘so as,’ or ‘on condition’,—when followed by words imposing an obligation on the grantee. But though these are apt words, and the most proper to be used for the purpose, they do not necessarily create a condition, for there may be other words in the deed qualifying them, showing that they were not used in their technical sense, and that a condition was not intended. Nor are those technical words necessary to create the condition, for the intent may be clearly and unequivocally expressed without them. As, if it be provided that, upon the failure of the grantee in the matter expressed, the grant shall be void, or the estate granted shall be forfeited, or the grantor may re-enter as of his former estate, a condition is created. But we have met with no case where the merely imposing an obligation on the grantee,—no technical terms to create a condition nor to clearly express an intent that on his failure the land shall revert to the grantor being used,—has been held to create a condition.”

See also, *Cross v. Carson*, 44 American Decisions, 742, and extended note, 743, 759, and extra annota-

tions, same case, pages 1242, 1243, 1244, 1245, same volume.

In *Chapin and Wife v. School District No. 2*, 35 N. H. 445, 450, the court says:

“The usual words of a condition subsequent are, ‘so that,’ ‘provided,’ ‘if it shall happen,’ or ‘upon condition.’ The latter, according to Lord Coke, is the most appropriate. No form of expression however, is essential to create a condition, and if it is manifest from the terms of the grant that it was made upon condition, the estate will become defeated if the condition is not kept. 2 Black. Com. 154.

“Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. Co. Litt. 205, b; 219, b. If it be doubtful whether a clause in a deed is a condition or a covenant, the courts will incline against the condition, for a covenant is far preferable. 4 Kent’s Com. 132. Kent says that the distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case. That the intention of the party to the instrument is of controlling efficacy.”

In *Emerson v. Simpson*, 43 N. H. 475, 477, the court says:

“Conditions subsequent are not favored in law, says Ch. Kent (4 Com. 129), and are con-



strued strictly, because they tend to destroy estates; and a vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. If then a condition be personal, as that the lessee shall not sell without leave, the executors of the lessee not being named, may sell without incurring a breach. Dyer 65; Moor 11.

“It is a general rule (says the Touchstone 133), that such conditions annexed to estates as go in defeasance, and tend to the destruction of estates, being odious in the law, are taken (that is construed or expounded) strictly, and shall not be extended beyond their words, unless it be in some special cases;”

In *Page v. Palmer*, 48 N. H. 385, 387, the court says:

“It is well settled that in case of such a grant on terms or conditions as in this case, where the conditions are subsequent to the grant, the conditions are not favored in law, and are to be strictly construed; and that in order to bind the heirs or assigns to the performance of such conditions they must be expressly mentioned in the condition.”

*Wier and others v. Simmons and others*, 55 Wis. 637, 643, the court says:

“The rule is well settled that conditions subsequent which work a forfeiture of the estate are not favored in the law, and no language will be construed into such a condition contrary to the intent of the parties when such

intent can be derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof; nor will the language used be construed into such a condition subsequent, when any other reasonable construction can be given to it."

In *Curtis v. Board of Education*, 43 Kan. 138, 144, the court says:

"The authorities are uniform that estates upon condition subsequent, which after having been fully vested may be defeated by breach of the condition, are never favored in law, and that no deed will be construed to create such an estate, unless the language to that effect is so clear that no room is left for any other construction. (2 Devlin on Deeds sec. 970, et seq., and cases there cited.) And as illustrations generally of the disfavor with which conditions subsequent are considered by the courts, and as having some application to this case, see the following cases: *Packard v. Ames*, 16 Gray, 327; *Rawson v. School District*, 7 Allen, 125; *Chapin v. Harris*, 8 Id. 594; *Sohier v. Trinity Church*, 109 Mass. 1; *Lareree v. Carlton*, 53 Me. 211; *Emerson v. Simpson*, 43 N. H. 475; *Wier v. Simmons*, 55 Wis. 627; *Mills v. Evansville Seminary* 58 Id. 135; *Stanley v. Colt*, 5 Wall. 119.

In *Gadberry v. Sheppard*, 27 Miss. 203, 207, the Court says:

"In order to make an estate upon condition subsequent, the grant must contain the condi-

tion in express terms or by clear implication, because such conditions are not favored in law, and are construed strictly, as tending to destroy estates. Co. Litt. 219, b.; 4 Kent's Com. 130; 2 Cruise's Dig. 8, sec. 38."

In *Brown v. Caldwell*, 23 West Virginia, 187, 189, the court says:

"In *Rawson v. Uxbridge*, 7 Allen 125, it was held, that 'a grant of land, which has been used as a burying place to a town, 'for a burying-place forever,' in consideration of love and affection, 'and divers other valuable considerations,' is not a grant upon a condition subsequent.' In the opinion of the court, delivered in that case by chief-justice Bigelow, the court says: 'It is said in Shep. Touch. 126, that 'to every good condition is required an external form;' that is, it must be expressed in apt and sufficient words, which according to the rules of law make a condition; otherwise it must fail of effect. This is especially the rule applicable to the construction of grants. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition of the interest of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument'—(citing Co. Litt. 205b; 4 Kent. Com.



(6th Ed.) 129, 132; Shep. Touch. 133; Merri-field v. Cobliegh, 4 Cush. 178, 184; 7 Allen 127, 128.)

“The usual and proper technical words by which a conditional estate is granted by deed are ‘provided,’ ‘so as,’ or ‘on condition.’ Coke says: ‘Words of condition are *sub conditione, ita quod, proviso*’—Parlington’s Case, 10 Co. 42a; Co. Litt. 203a, 203b. So a condition in a deed may be created by the use of the words ‘*si*’ or ‘*quod si contingat*’ and the like, if a clause of forfeiture or re-entry be added. Co. Litt. 204a, 204b; Duke of Norfolk’s Case, Dyer, 138b.

“In public land grants and in devises a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention on payment of a certain sum. But this rule is not applicable to grants of gifts except such as are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created.”

This rule announced in the case just cited, and relying upon the case of Rawson v. Uxbridge, 7 Allen 172, applied to the case of a grant of public lands, as here, made upon a sufficient and adequate consideration moving to the United States from the the grantee, justifies the contention that inasmuch as these lands were granted to aid in the construction of the road and were to be acquired for a consideration, to wit, the construction of a road and

the free transportation of the property and troops of the United States for all time, and other pecuniary considerations, such as enhancing the value of the even sections of the land contiguous to the granted lands, the United States did not intend by the words of the actual settler clause to create a conditional estate in the grantee, or to create a condition subsequent, for breach of which the entire consideration of the grant might fail.

In *Rawson v. Inhabitants of School District No. 5 in Uxbridge*, 7 Allen 125, 128, Chief Justice Bigelow, speaking for the court, says:

“Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. Co. Litt. 205 b, 219 b. 4 Kent Com. (6th ed.) 129, 132. Shep. Touchstone, 133. *Merrifield v. Cobleigh*, 4 Cush. 178, 184.”

\* \* \* \* \*

“In grants from the crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention, or on payment of a certain sum. But this rule is applicable only to those grants or gifts which are purely voluntary and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created.”

\* \* \* \* \*

“But if grants so expressed can be construed to create a condition by which to defeat an estate on breach and entry, it is clear that such an interpretation of them is confined to cases where the whole consideration of the grant is the accomplishment of a specific purpose, and the enjoyment of the estate granted is clearly made dependent on the performance of an act or the payment of money for the use or benefit of the grantor or his assigns. We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.”

In *Kirkpatrick v. M. & C. C. of Baltimore*, 81 Maryland 179, 192, the court says:

“Technical words are not absolutely essential to create a condition, nor on the other hand does their use necessarily raise one; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only. *Paschal v. Passmore*, 15 Pa. St. 295; *Bacon v. Huntington*, 14 Conn. 92; *Lessee of Worman v. Teagarden*, 2 Ohio St. 380; *Waters v.*



Bredin, 70 Pa. St. 235; Laberee v. Carlton, 53 Me. 211.

“Conditions subsequent are not favored in law ‘because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures.’ 4 Kent, 130; Stanley v. Colt, 5 Wallace, 119. Therefore it is, that a condition will not be raised by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. Packard v. Ames, 16 Gray, 327; Bigelow v. Barr, 4 Ohio, 358.

“And as a further consequence of this rule, it has always been held that ‘in doubtful cases the disposition of the Courts is to construe language as creating a trust or covenant rather than a condition. See Earle v. Dawes, 3 Md. Ch. Rep. 230; Brantly’s note and authorities there cited; Scovill v. McMahon, 62 Conn. 378, 26 At. R. 481; Greene v. O’Connor, 18 R. I. 49, 25, At. R. 692; Rawson v. Inhabitants, &c., 7 Allen 128, 129.

“In the elaborate and able opinion delivered in the last cited case by Bigelow, C. J., the Court said: ‘If it be doubtful whether a clause in a deed be a covenant or condition, Courts of Law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument.’ \* \* \*  
‘We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used when such purpose

will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.' ”

In *Gallaher v. Herbert*, 117 Ill. 160, 169, the court says:

“There is nothing in the form of the language here employed to indicate that it was intended the conveyance was upon a condition subsequent. The words, ‘upon condition’, do not occur, and there are no other words of equivalent meaning. There is no clause providing that the grantor shall re-enter in any event, and these are the usual indications of an intent to create a condition subsequent. Sheppard’s Touchstone, (6th ed.) 118.”

In *Elyton Land Co. v. South & North Alabama R. R. Co.* 100 Ala. 396, 406, the court says:

“Conditions subsequent are not favored in the law, and are construed strictly, for the reason, that they tend to destroy the estate granted, and in many instances, when rigorously exacted, work hardships scarcely reconcilable with good conscience. And, when there remains a doubt, if the clause in a deed be a covenant, limitation, or condition, the court will incline against the latter, preferring the former. Nor are conditions sustained, when repugnant to the estate granted, or infringe upon the essential enjoyment and independent

rights of property, and tend manifestly to public inconvenience. 4 Kent 130, 131, 132, Co. Litt. 205, b, 219, b. Lord Cromwells case, 2 Coke 720; Chapin v. Harris, 90 Mass. 594."

In *Voris v. Renshaw*, 49 Ill. 425, 430, Mr. Justice Walker, speaking for the court, says:

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and a rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. 4 Kent Com. 129. And as illustrating the rule, we find that it has been held, that where the condition is personal to the grantee, as that he shall not sell without leave, the executors of the lessee not being named in the condition, may sell without incurring a breach. Dyer, 65; Moore, 11.

"In Shep. Touchstone, Vol. I, p. 133, it is said: 'It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases.' "

In *Hunt v. Beeson*, 18 Ind. 380, 382, the Court says:

" 'Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with con-



science.' 4 Kent 130. In *Merrifield v. Cobleigh*, 4 Cush. 178, 184, it was said by the Court, in speaking of a condition subsequent, 'such a condition, when relied upon to work a forfeiture, is to be construed with great strictness; the demandant shall have his exact legal right and no more.' "

In *Jefferson, Madison & Indianapolis R. R. Co. v. Barbour*, 89 Ind. 375, 378, the court says:

"Conditions subsequent are not favored in law. They are strictly construed. *Hunt v. Beeson*, 18 Ind. 380. The authorities are unanimous in holding that conditions subsequent require unusual strictness of construction. 'A court of equity,' says Chancellor Kent, 'will never lend its aid to divest an estate for the breach of a condition subsequent. The cases, on the contrary, are full of discussions, how far chancery can relieve against subsequent conditions.' 4 Kent. Com. 130."

In *Summer v. Darnell*, 128 Ind. 38, 43, the court says:

"The rule of strict construction applicable to conditions subsequent, usually expressed in the words, 'Conditions subsequent are not favored in law, and are construed strictly,' is elementary, and does not require the citation of authorities.

"A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it."

\* \* \* \* \*

“A condition may be created by any words which show clear, unmistakable, intention on the part of a grantor to create an estate on condition, regard being had to the whole of the deed in which they occur. The word ‘condition’ need not be used, but words importing a condition must be used, or plainly inferred from the instrument and the existing facts.”

In *Post et al. v. Weil et al.*, 115 N. Y. 361, 371, the court says:

“I think we are in conscience bound to give that construction and thereby place ourselves in accord with that inclination of the law, which regards with disfavor conditions involving forfeiture of estates. In this connection, it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor, or his heirs, to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance, in connection with the circumstances of the case and the intent to be fairly presumed therefrom.”

In *Graves et al., v. Deterling et al.*, 120 N. Y. 447, 457, the court says:

“There is no provision for a forfeiture or re-entry, nor anything from which it can fairly be inferred that the continuance of the estate is to depend upon the supposed condition, yet this is regarded as essential in order to create a condition. (*Lyon v. Hersey*, 103 N. Y. 264, 270; *Craig v. Wells*, 11 id. 315, 320.)

It seems to be a settled rule in the State of New York that “where there is no provision for re-entry or forfeiture and nothing to support an inference that the estate was intended to depend upon performance of the condition, the words used will be held to import a covenant and not a condition.” *Cunningham v. Parker*, 146 N. Y. 29, 33.

There are well considered authorities for the contention that when the United States has parted with its title, for a consideration, to its lands, that any condition under which these lands are held must necessarily be void as in restraint of alienation or as contrary to the assumed sovereignty of the state in which the lands are situated.

*Camp v. Smith*, 2 Minn. 131, 144.

However this may be, and conceding for the purpose of the argument that the United States may create a condition subsequent in apt words in any grant conveying its lands to a grantee, even for a valuable consideration, for breach of which the



United States may at its election re-enter by legislative declaration of forfeiture, or by judicial proceedings adjudging the breach and consequent forfeiture, still it may well be contended that when the estate has vested, the words constituting the claimed condition must be construed according to the settled rule applicable to conditions subsequent or words claimed to create such an estate in the jurisdiction in which the lands are situated. In other words, that the construction of language claimed to create a condition subsequent as announced and adhered to by the Supreme Court of the state in which the lands are situated becomes a rule of property and is applicable to language in grants made by the United States which create a condition subsequent.

In *Seymour v. Sanders*, 3 Dillon, 437, 440, Judge Dillon says:

“Thus the plenary power of Congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

“The title to all public lands must pass and vest according to the laws of the United States (*Wilcox v. Jackson*, 13 Pet. 498, 517). And, undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legislation, and the power of the general government

with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which congress disposes of the land.”

See also *United States v. Gratiot*, 14 Pet. 526.

The contention we make, however, does not go to the estate conveyed or the terms upon which the estate has been conveyed by the United States, it goes to the question, whether or not, in construing the alleged condition subsequent annexed to such estate, the rule adopted by the state in which the lands are situated shall control.

In *Wilcox v. McConnel*, 13 Pet. 496, 516, Mr. Justice Barbour, speaking with the unanimous opinion of the court, says:

“We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.”

This would require an application of the rules of the common law as declared by the highest court

of the state in which the lands granted are situated, and this is as it ought to be, because the state has the right to tax those lands as to which the alleged condition is attached, and there remains in the United States only a possibility of reverter, and it would not be in harmony with the public policy or the sovereignty of the state to permit the United States to lie by, having a right of action in the nature of a possibility of reverter, resting upon breaches of the alleged condition of which the state has no knowledge and to which it is not a party.

Whether this construction by a state court is considered a rule of property binding upon the federal court or not, is for the moment immaterial. This court, unless controlled by some decision of the Supreme Court of the United States, or of the Circuit Court of Appeals for the Ninth Circuit, will be inclined to follow the rule adhered to by the Supreme Court of the State.

In *Raley v. Umatilla County*, 15 Oregon, 172, 179, Mr. Justice Strahan, speaking for the court, then composed of Justices Lord, Thayer and Strahan, says:

“To create a condition in a grant, apt and appropriate words ought to be used, such as ‘on condition,’ ‘provided always,’ ‘if it shall so happen,’ or ‘so that the grantee pay, etc., within a specified time,’ and the like. Therefore, ‘the grant of a lot of land to set a meeting-house thereon does not imply a condition. And an



estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture. And yet these words may create a condition if a right of re-entry is reserved in favor of the grantor in case of failure to carry out the intention thus expressed.' (2 Washburn on Real Property, pp. 4, 5.)"

In *Coffin v. City of Portland*, 16 Ore. 77, 80, Mr. Justice Thayer, speaking for the court, says:

"A condition subsequent in a deed, that will, under any circumstances, defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it shall operate as a forfeiture of the estate granted. When such a condition is broken by the grantee, the grantor is entitled to re-enter, but a court of equity will not entertain jurisdiction to declare the forfeiture. The grantor must go into a court of law if he desires to enforce the condition. Equity will not decree a forfeiture."

In the *City of Portland v. Terwilliger*, 16 Ore. 465, 469, Mr. Justice Strahan, speaking for the court, says:

"In *Raley v. Umatilla County*, 15 Ore. 172, we had occasion to consider the doctrine of es-

tates upon condition, and particularly upon condition subsequent, and reached the conclusion that courts will not favor the forfeiture of estates, and that the rule of the common law that estates upon condition may be defeated by non-performance of the condition subsequent is to be construed strictly; and that if there is any other reasonable construction which can be given to a deed so as to avoid a forfeiture, it ought to receive such construction. In *Wier v. Simpson*, 55 Wis. 637, the language of the deed was: 'Upon the express condition', etc; but the court held that such language did not create an estate upon condition, and said: 'The rule is well settled that conditions subsequent which work a forfeiture are not favored in the law, and no language will be construed into such condition contrary to the intent of the parties, when such intent can be derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof; nor will the language used be construed into such condition subsequent when any other reasonable construction can be given to it. The rule was thus forcibly stated by the late chief justice in the case of *Laws v. Hyde*, 39 Wis. 345, 356, and the rule there announced is approved in these cases: *Lyman v. Babcock*, 40 Wis. 503; *Morse v. Ins. Co.*, 30 Wis. 534; *Jackson v. Silvernail*, 15 Johns. 278; *Hadley v. Hadley*, 4 Gray, 140; *Osgood v. Abbott*, 58 Me. 74; *Merrifield v. Cobleigh*, 4 Cush. 178.' So it was said in *Woodworth v. Payne*, 74 N. Y., 196; 'Conditions in grants are not favored in law, and hence they must be clearly expressed.

(Craig v. Wells, 11 N. Y. 315.) They are also to be construed with great strictness, because they tend to destroy estates, and vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience.' And other authorities are to the same effect. (First Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Company, 103 Pa. St. 608; Harner v. Chicago, Milwaukee & St. P. R. R. Co. 38 Wis. 165; Hoyt v. Kimball, 49 N. H. 322; Paschall v. Passmore, 15 Pa. St. 295; McKnight v. Krentz, 51 Pa. St. 232; Mills v. Evansville Seminary Co., 58 Wis. 135; Cross v. Carson, 8 Blackf. 138; 44 Am. Dec. 744, and note.)”

Applying the rule thus announced by the Supreme Court of Oregon to the language used in the so-called actual settlers clause, construed in connection with the practical administration of these grants from the beginning to the commencement of this suit, a period of more than 36 years,—is it not clear, in view of the changed policy of the United States as to the disposition of its public lands of the character of the lands involved in suit, that these words do not create a condition subsequent, and that the United States must be held to have acquiesced in the construction adopted by the company in the beginning.

No one could have supposed that for a breach of this actual settlers clause in the early days of the administration of this grant, when these lands were



not sought for settlement or for any purpose, and when, indeed, settlement could not be made, the entire grant or any part of the same would be subject to forfeiture to the United States. No investor would have purchased a single bond issued to secure construction funds; no bonds secured by mortgage on these lands could have been negotiated. The grant, instead of having been of value to the company, would have been a burden. Even now the lands, as shown by the record, are not sought by actual bona fide settlers upon which such settlers shall make homes, but the proof shows that the lands are sought chiefly and solely for their timber value, and in the main by speculators or persons who have been induced by timber brokers and agents to attempt to purchase, under the actual settlers clause for \$400 per quarter section, lands worth, upon an average, from \$3000 to \$10,000 per quarter.

The action of Congress in passing the so-called "innocent purchasers" act of August 20, 1912, by which nearly four hundred thousand acres of land sold by the company to timber men and companies in quantities in excess of one thousand acres and at prices in excess of \$2.50 per acre, is a distinct recognition of the non-settlement character of these lands, and is an express waiver as to them of the essential and controlling facts upon which the United States is now seeking to take from the company the remainder of its unsold lands of substantially the same kind and class as those title to

which is proposed to be quieted in these so-called innocent purchasers.

The act further provides that the lands when forfeited shall be reserved from sale or settlement under the public land laws until the further action of Congress, thus indicating beyond any sort of doubt, that these lands are not deemed suitable for entry or settlement under the homestead act, the only law under which lands can be obtained by the settler.

In such situation, which has been controlling for nearly forty years, is it not clear that these words so claimed to constitute a condition subsequent should be construed in harmony with the action of all the parties as creating merely a preference right of purchase in the actual settlers that were upon these lands prior to the definite location of the road, or, at most, prior to the issuance of patents.

In light of the testimony now before the Court, we earnestly insist that the language used in the actual settlers clause should not be construed to create a condition subsequent, and that if it is so construed, it should be held to have been waived by the United States, or to be impossible of performance within the true spirit and meaning of the contract between the parties, in the light of subsequent legislation by Congress, and in the light of the action of both parties from the beginning.

## V.

THE UNITED STATES CANNOT IN EQUITY AS A SUITOR ENFORCE THE "ACTUAL SETTLER" CLAUSE, ASSUMING THAT ITS WORDS CREATE A CONDITION SUBSEQUENT, BECAUSE

(1) THE UNITED STATES HAS WAIVED ITS RIGHT BY LONG CONTINUED ACQUIESCENCE AND AFFIRMATIVE ACTION, WITH FULL KNOWLEDGE OF CONTINUED BREACHES BY THE COMPANY FROM THE EARLIEST ADMINISTRATION OF THE GRANTS, TO THE PASSAGE AND ENFORCEMENT OF THE ACT OF AUGUST 20, 1912, (SO-CALLED INNOCENT PURCHASER'S ACT).

(2) BECAUSE THE UNITED STATES IS ESTOPPED, IN VIEW OF ALL OF THE FACTS AND CIRCUMSTANCES, TO ATTEMPT TO ENFORCE THE SAME.

The Act of July 25, 1866, (14 Stat. 239) and the amendments thereto, including the Act of April 10, 1869 (16 Stat. 47), and the Act of May 4, 1870 (16 Stat. 94), were not only laws but were contracts. In so far as these statutes constitute contracts between the United States and the grantee companies and their successors, the same rules of construction apply as apply to other contracts. In any litigation involving the rights of the parties under these contracts, the United States as a suitor proceeds in its proprietary capacity and is bound by the same legal and equitable rules and principles of law applicable to individuals.



In *United States v. Beebee*, 17 Fed. 36-37-40-41, the Court says:

“A court of equity cannot contemplate with any degree of favor the proposition that this land shall, at this late day, be declared a part of the public domain, or granted to claimants who have so long slept upon their rights. It must, however, be conceded that, as a general rule, the United States is not bound by any statute of limitations not imposed by Congress, or chargeable with laches.” \* \* \*

Judge McCrary, after citing numerous authorities to the point, says:

“In view of these authorities, and upon reason, I hold it to be a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. Such being the law, it is clear that lapse of time may be a sufficient defense to a suit instituted in the name of the government.

“It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.” (Citing authorities).

In *United States v. White*, 17 Fed. 561-565, Sawyer, J. says:

“Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States goes into a court of equity as a suitor, it is subject to the defenses peculiar to that court. *U. S. v. Tichenor*, 8 Sawy. 156; *U. S. v. Flint*, 4 Sawy. 58-9; *Badger v. Badger*, 2 Wall. 94; *Stearns v. Page*, 7 How. 829.”

In *United States v. Bostwick*, 94 U. S. 53-66, the Court speaking by Chief Justice Waite, says:

“The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

In the case of *The Siren*, 7 Wallace 152-159, the Court says:

That the government by its appearance in court “waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.”

See also *Brent v. Bank of Washington*, 10 Peters 569-615.

In *United States v. McElroy*, 25 Fed. 804, Judge Brewer quotes with approval case of *U. S. v. Beebee*, 17 Fed. 37.

In *United States v. Ingate*, 48 Fed. 251, the Court says:

“It is well settled that, ‘when the United States voluntarily appear in a court of justice, they, at the same time, voluntarily submit to the law, and place themselves upon an equality with other litigants.’ *U. S. v. Beebee*, 17 Fed. Rep. 40; *U. S. v. Barker*, 12 Wheat. 559; *Mitchel v. U. S.*, 9 Peters 743; *Brent v. U. S.*, 10 Peters 615. ‘The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party.’ *U. S. v. Smith*, 94 U. S. 217. In *Brent v. Bank*, 10 Pet. 615, the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which their courts administer their remedy. In 18 Fed. Rep. 278, in the case of *U. S. v. Coal, etc., Co.*, the court says:

‘It is true, as a general proposition, that when the government becomes a party to a suit in its own courts, it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, in that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States.’ ”



In *United States v. Devereux*, 90 Fed. 182-6, the Circuit Court of Appeals for the Fourth Circuit, says:

“The United States do not and cannot hold property as a monarch may for private or personal purposes. *Van Brocklin v. Tennessee*, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (*U. S. v. Insley*, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confided; nor are they bound by any statute of limitations (*U. S. v. Railway Co.*, 118 U. S. 120, 6 Sup. Ct. 1006).

“With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied, and bind all parties. *Port Royal & A. Ry. Co. v. South Carolina*, 60 Fed. 552; *Prioleau v. U. S. L. R.* 2 Eq. 659.

“And in *U. S. v. Flint*, Fed. Cas. No. 15,121 (Field, Circuit Judge), we find:

‘If, on consideration of the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, although the United States be the suitor.’

In *United States v. North American Commercial Co.*, 74 Fed. 145-151, Wallace, Circuit Judge, says:

“When the government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction, and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of its obligation. As was said in *Cooke v. U. S.*, 91 U. S. 398:

‘If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.’ ”

In *United States v. Northern Pacific Railway Co.*, 95 Fed. 864-880, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

“This is a suit in equity, brought by the government itself to set aside the solemn judgment and conveyance of the quasi judicial tribunal to which it intrusted the power, and on which it imposed the duty to hear and determine the very question whether or not the corporation was entitled to do these acts, and thereby to earn these lands, notwithstanding the fact that the time fixed for their performance had passed. That tribunal determined all these questions from time to time, as they were presented, in favor of the railroad company. When the map of definite location of this part of the line was filed in 1882, the land department accepted and approved it, and ad-

justed the land grant to the line there shown. When the resolution fixing the terminus at Ashland was filed, it accepted and approved that selection, and adjusted the land grant accordingly. As the railroad was constructed from Thomson to Ashland, commissioners appointed by the president, under the charter, examined it, and reported that it was completed in accordance with the requirements of the act, and the land department thereupon issued patents to the lands appertaining to this portion of the railroad. The company constructed its road from Thomson to Ashland over hill and dale, through forest, swamp, and morass, in reliance upon these decisions, and in the belief which they induced that it would thereby earn these lands; and it has been operating this railroad for more than a decade. While this construction was proceeding, congress took no action, under section 9 of the charter, on account of any breach of the conditions thereof by the company; the government brought no suit to avoid the decisions of these tribunals to which it had intrusted the power to hear and determine these questions, and gave no warning that it would ever question them; but now, more than 10 years after the road was built, after the government has secured the railroad, the advanced price of the even-numbered sections which it retained within the limits of the grant, and the settlement, occupation, and sale of its otherwise worthless lands which the railroad has induced, it asks this court of equity to strip this company of the lands which it promised to convey, and did



convey, in consideration of the construction of the railroad, because that railroad was not built within the time fixed in the act. In other words, it asks this court to relieve it of the burdens while it retains the benefits of a contract which it not only permitted, but actively induced, the corporation to perform out of time, and which it has itself executed. There is no equity in this prayer. The same fundamental rules of right and justice govern nations, municipalities, corporations, and individuals. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than do those of a private individual under like circumstances. 'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction.' *Boone v. Childes*, 10 Pet. 177, 210; *Illinois Trust & Savings Bank v. City of Arkansas City*, 40 U. S. App. 257, 294; 22 C. C. A. 171, 193, and 76 Fed. 271, 293; *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 291, 15 C. C. A. 96, 108, and 67 Fed. 948, 960. The act of the railroad company in building its road and receiving the land pertaining thereto was commendable. If one is unable to perform his promise at the time agreed upon, it is not wrong, either in morals or in law, but eminently just and right, that he should perform it thereafter, especially when the promisee accepts and requests it. Courts of equity sometimes enforce the specific performance of a contract, but they never undo its execution when it has been performed on

the one hand, and its performance has been accepted on the other, with a full knowledge on the part of both parties of the facts which conditioned its completion.

“In the second place, when the corporation presented its map of definite location to the land department in 1882, and its selection of its eastern terminus in 1884, the only objection to their acceptance was that they were out of time. But the United States had the right to waive this objection, and to approve the location and selection notwithstanding this fact, and when it did so, and the road was constructed in reliance upon it, that waiver was irrevocable. The government intrusted the power and imposed the duty to consider and determine whether or not this waiver should be made to the officers of the land department, and they waived the delay, and approved the location and selection. These adjudications of this department stand unchallenged. No appeal was taken from them. They have not been set aside for fraud, error, or mistake. They therefore have all the force of judicial decisions, and conclude the question. *Hartman v. Warren*, 40 U. S. App. 245, 250, 22 C. C. A. 30, 33, and 76 Fed. 157, 159, 160; *Bogan v. Mortgage Co.*, 27 U. S. App. 346, 350, 11 C. C. A. 128, 130, and 63 Fed. 192, 195; *Railway Co. v. Sage*, 36 U. S. App. 340, 355, 17 C. C. A. 558, 567, and 71 Fed. 40, 49.”

This is also cogent and forceful reasoning as applied to the facts under particular consideration here upon the subject of waiver and estoppel.

In *United States v. Clark*, 138 Federal 294, 229, Judge Ross, speaking for the Circuit Court of Appeals, Ninth Circuit, says:

“As a matter of course, when the government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances, etc.”

In *United States v. Budd*, 43 Federal 630-34, Judge Hanford says:

“When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity. It can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S. v. White*, 17 Fed. Rep. 561, *U. S. v. Tin Co.*, 23 Fed. Rep. 279, and the same case 125 U. S. 273, 8 Sup. Ct. Rep. 850.”

In *Mountain Copper Co., v. United States*, 142 Federal 625, 629, Judge Ross, speaking for the Circuit Court of Appeals, Ninth Circuit, says:

“It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less. *United States v. Clark* (C. C. A.) 138 Fed. 294; *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 67 C. C. A. 1; *United States v. Flint*, 4 Sawy. 42, Fed. Cas. No. 15,121;



Foster's Federal Practice, Sec. 63; *United States v. Barker*, 12 Wheat. 559, 6 L. Ed. 728; *Mitchel v United States*, 9 Pet. 743, 9 L. Ed. 283; *Brent v. Bank of Washington*, 10 Pet. 615, 9 L. Ed. 547; *United States v. Smith*, 94 U. S. 217, 24 L. Ed. 115; *Am. & Eng. Enc. of Law* (2d Ed.) vol. 4, p. 271."

In *United States v. Flint*, 4 Sawyer 42, 58, affirmed in 98 U. S. 58, Mr. Justice Field says:

"The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. And, when they go into a court of equity, they must equally present a case by allegation, and proof entitling them to equitable relief."

In *Lynch v. United States*, 13 Okla. 142-144, the Supreme Court of Oklahoma says:

"The United States stands in no different relation as a suitor than any individual. When the government comes into court to submit a question to judicial determination, she is not acting in her capacity as a sovereign, but as a

litigant, claiming the same rights, and bound by the same rules as any of her citizens under similar circumstances. This was expressly held in *The United States v. The Bank of Metropolis*, 15 Peters 377; *Brent v. Bank of Washington*, 35 U. S. 596; *United States v. Hughes*, 11 How. 552; *United States v. Throckmorton*, 98 U. S. 61; *United States v. Miner*, 114 U. S. 223."

In *United States v. San Jacinto Tin Co.*, 125 U. S. 273-285, the Court, speaking by Mr. Justice Miller, says:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no

obligation to the party who will be benefitted to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

In *United States v. Grand Rapids & I. R. R. Co.*, 165 Fed. 297, 304, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, says:

"That these facts do not constitute such a claim as might be affirmatively asserted against the government may be conceded. That they may be the basis of an equitable defense against a claim for the price of lands so erroneously patented, when that claim is asserted in a court of equity, we have no doubt. This would be true if such a claim was presented by a private litigant, and it is no less true when the government comes into a court of equity for the relief it now asks. Equity will not lend its active assistance contrary to conscience and the plain justice of a case. *United States v. Winona & St. Peter Railroad Co.*, 165 U. S. 463, 482, 17 Sup. Ct. 368, 41 L. Ed. 789; *United States v. Detroit Lumber Co.*, 200 U. S. 322, 338 et seq., 26 Sup. Ct. 282, 50 L. Ed. 499."



In *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321-339, Mr. Justice Brewer, speaking for the Court says:

“It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the Government and its vendees we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions.”

In *United States v. Throckmorton*, 98 U. S. 61, 64, Mr. Justice Miller, speaking for the Court, says:

“It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest.”

This affirmed the case of *United States v. Flint*, *United States v. Throckmorton*, and *United States v. Carpenter*.

That the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and the Act of May 4, 1870 (16 Stat. 94) are contracts binding upon the United States as well as upon the companies, and should be construed as such, the attention of the Court is called to the *Sinking-Fund Cases*, 99 U. S. 700-719, construing the Act of May 7, 1878, (20 Stat. 56), entitled,

“An Act to alter and amend the act entitled ‘An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,’ approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act.”

where the Court, speaking by Mr. Chief Justice Waite, says:

“The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of

property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

That the United States is entitled without express legislative authority, to the civil remedies ordinarily administered in its courts, and that the United States may bring suits to enforce its contracts and protect its property was distinctly ruled in the case of *United States v. Holmes*, 105 Fed. 41-43, where Judge Wellborn says:

"There seems to me no room for reasonable controversy but that the government of the United States, for the protection of its property, is entitled, without express legislative authority, to the civil remedies ordinarily administered in its courts. On this point the Supreme Court of the United States has said:

'It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same



remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although, as a sovereign, the United States may not be sued, yet as a corporation, or body politic, they may bring suits to enforce their contracts and protect their property in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in *Dugan v. U. S.*, 3 Wheat. 181, 4 L. Ed. 364, 'It would be strange to deny them a right which is secured to every citizen of the United States.' In *U. S. v. Bank of Metropolis*, 15 Pet. 392, 10 L. Ed. 774, it was declared that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In *U. S. v. Gear*, 3 How. 120, 11 L. Ed. 523, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.' *Cotton v. U. S.* 11 How. 229, 13 L. Ed. 675."

See also *United States v. American Surety Co., of New York*, 110 Fed. 913.

In *Davis v. Gray*, 16 Wallace 203-232, Mr. Justice Swayne, speaking for the Court, says:

"When a State becomes a party to a contract, as in the case before us, the same rules

of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

This was a case where a large grant of land had been made by the State of Texas to a railroad company, defeasible if certain steps were not taken within a prescribed time. The court held that this grant constituted a contract, and that the United States was bound thereby in the same manner as a private party. It will be observed also that the grant there construed contained a condition subsequent, which became impossible of performance.

This case also illustrates the doctrine that "breaches of such conditions may be waived by the grantor expressly or *in pais*."

In *Port Royal &c Ry. Co. v. South Carolina*, 60 Fed. 552-553, the Court says:

"A sovereign state cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the state comes into court of her own accord, and invokes its aid, 'she is, of course, bound by all the rules established for the administration of justice between individuals.' *State v. Pacific Guano Co.*, 22 S. C. 74."

In *United States v. Budd*, 144 U. S. 154, 160, Mr. Justice Brewer, speaking for the court, says:

“The first question is, perhaps, stated too broadly, for the inquiry is necessarily limited to the land in controversy. If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the government? We have had many cases of this nature before us, and the rules to guide in its determination have been fully settled. *Kansas City, Lawrence &c Railroad v. Attorney General*, 118 U. S. 682; *Maxwell Land Grant Case*, 121 U. S. 325, 381; *Colorado Coal Co. v. United States*, 123 U. S. 307; *United States v. Des Moines Navigation &c. Co.*, 142 U. S. 510.

“In the second of these cases Mr. Justice Miller thus clearly states the rule:

‘We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the



grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. \* \* \* ” ”

In *People v. Stephens*, 71 N. Y. 527-549, Mr. Justice Allen, speaking for the court and concurring in the opinion of Mr. Justice Rapallo, says:

“The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor. The State is not, in tutelage, as one incapable of acting *sui juris*, but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, acting within the general scope of their constitutional powers, whether ministerial or executive.”

In *Carr v. The State*, 127 Ind. 204, 206, Mr. Justice Elliott, speaking for the court, says:

“In entering into the contract it laid aside its attributes as a sovereign and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a State whenever it enters into an ordinary business contract. *Hartman v. Greenhow*, 102 U. S. 672; *Poindexter v. Greenhow*, 114 U. S. 270; *Keith v. Clark*, 97 U. S. 454; *Murray v. Charleston*, 96 U. S. 432; *Gray v. State, ex rel.*, 72 Ind. 567; *State ex rel., v. Cardozo*, 8 S. C. 71; *People v. Canal Com’rs*, 5 Denio, 401; *Georgia, etc. Co., v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 534; *Grogan v. San Francisco*, 18 Cal. 590.”

In *State v. Kilburn*, 81 Conn. 9, 12, the court says:

“This action being an equitable one, the State, by bringing it, opened the door to any defense or cross-complaint germane to the matter in controversy, that the city might see fit to interpose. A sovereign who asks for equity must do equity. *Rowan v. Sharps Rifle Mfg. Co.*, 29 Conn. 282, 330.”

In *People ex rel Ambler v. Auditor General*, 38 Mich. 746, 750, the Court says:

“The doctrine is well settled that where a State sues it is limited in its recovery by any

defenses which might be set up against individual plaintiffs. *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225; *Michigan State Bank v. Hammond*, Id., 527."

The case of *Michigan State Bank v. Hastings*, 1 Douglas 224, 252, involved a condition subsequent and the effect of a breach of such condition, and whether under all the circumstances a court of equity was warranted in granting the relief prayed for. The case proceeds upon the theory that the rights of the State are to be determined by the same rules of law and the same principles of equity which obtain between individuals.

In the case of *Daggett v. Bonewitz et al*, 107 Ind. 276, 279, the Court says:

"Where the Nation enters into a contract it is as much bound as an individual citizen. *Les-sieur v. Price*, 12 How. 59; *Murray v. Charleston*, 96 U. S. 432; *Gray v. State*, ex rel., 72 Ind. 567."

In *Murray v. Charleston*, 96 U. S. 432, 445, the Court, speaking of the contracts of the State, says:

"The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons."

And so in the case under consideration, when the United States made these grants it was not acting



excepting in a very general and large sense in its capacity as sovereign, but was acting in its proprietary capacity as the owner of the lands granted. It was seeking to secure the construction of a trans-continental railroad from the Mississippi Valley, commencing at Omaha, to Sacramento, California, and thence by way of an extension of the Central Pacific Line from Roseville Junction to Portland. It was seeking in its proprietary capacity to increase the value of its unsold lands, and to secure pecuniary benefits by reason of the construction of the road and the performance of the contract upon the part of the grantee companies. Viewing its contract, therefore, in respect to the earning of these lands by the grantee companies, the performance of that contract by the grantee companies, the consideration paid and to be paid for the conveyance of the title—all these things considered—the United States, a contracting party, having the right of any other proprietor in case of condition subsequent to assert a forfeiture for breach of such condition, may waive such breach by acquiescence or conduct consistent with good faith, honesty and fair dealing on its part or by express action. This is not a case where the state or the government is acting or has acted in its capacity as sovereign, or in its governmental capacity in the strict and literal sense of that term. It is the case of an owner of land dealing with the grantee, not as a gift or gratuity bestowed upon the grantee, but upon the basis of a bargain, each party to the contract to

receive full compensation for the purchase of the property and the transfer of the title. This purchase price is not evidenced in a recital of a total sum of money to be paid by the one party and to be received by the other, but is evidenced by a pecuniary consideration to be paid continuously by one party and certain covenants mutually binding upon each. When performed, each party to the contract was to receive pecuniary benefits.

This view is expressed in clear and succinct language in the case of *Camp v. Smith*, 2 Minn. 131, 143, where the Court says:

“The state can never concede to congress the right to prescribe to the actual purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The federal government may regulate the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; congress has then exhausted the power over the public lands reserved by the constitution of the United States, and the sovereignty of the state immediately attaches. As well may Congress entail the public lands, or regulate the law of their descent and alienation in terms, as to prohibit the purchaser from selling until he has received the patent, and then delay the issuing of the patent at pleasure. We do not think that

congress so intended to legislate, and even if the act of September 4, 1841, had in plain terms prohibited the transfer of the lands instead of the mere right of pre-emption, until after the patent has issued, we are not yet prepared to regard such a prohibition as binding.

“The United States has not a proprietary interest in the public lands within the several states; the sovereignty is in the states. The rights attaching to the interest do not differ from those of any other landholder in the state, except as provided by the constitution of the United States and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The constitution merely asserts the right to dispose of, as proprietor, and to make needful rules and regulations necessary to the exercise of that right. But the right to dispose of does not include the right to limit the enjoyment after sale, nor to prescribe how or when the purchaser shall dispose of his land; and the right to make needful rules and regulations is such only as may be exercised by every proprietor.”

Nor is this principle in conflict with the compact between the United States and the State of Oregon evidenced by the act of February 14, 1859, admitting the state into the Union, nor the act passed by the legislative assembly of the State of Oregon, approved June 3, 1859, which provides:

“That the said state shall never interfere with the primary disposal of the soil within



the same by the United States, nor with any regulations Congress may find necessary for securing the title in said soil to the bona fide purchaser thereof."

It may well be claimed under this principle that when these lands had been earned by construction of road, that the title which has vested in fee simple was beyond control of the United States, and that the "actual settlers" clause contained in the act of April 10, 1869, and in section 4 of the act of May 4, 1870, was not a regulation intended to secure the title to bona fide purchasers, but was a condition in restraint of alienation not within the power of the United States to impose, and that it was not a regulation "necessary for securing the title in said soil to the bona fide purchasers thereof." It was an attempt—it may be true—to grant a title and then take it back upon breach of the alleged condition that the grantee should sell these lands to actual settlers at a particular price and in particular quantities. But however that may be, it is clear that the contract evidenced by these grants was a contract made by the United States in its capacity as a proprietor of the public lands, and not in its capacity as sovereign, or in its governmental capacity.

We have discussed these general principles to the effect that the United States is bound by its contracts, and that such contracts must be construed in the same way and in the same manner

as contracts by private parties, and that when the United States seeks to enforce these contracts in a court of equity it comes into that court not as a sovereign, but as a suitor, and that, with certain well recognized exceptions, its rights must be measured by the same rules and according to the same standard as measured to other suitors, in order that we may clearly demonstrate the application of the defenses now to be considered.

The doctrine of waiver and equitable estoppel is applicable to the United States, and upon the facts in this case the United States must be held to have waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company from the earliest administration of the grants to the passage of the act of August 20, 1912 (so-called Innocent Purchaser's Act), and the United States is estopped under the facts disclosed by the testimony to attempt to enforce the alleged condition subsequent.

There is, perhaps, a technical difference or distinction between waiver and estoppel. This is recognized in the case of *State ex rel., Douglas v. School District No. 108*, 85 Minn. 230, 233, where the Court says:

"The rule is that in quo warranto proceedings instituted by a state the doctrine of waiver, operating by way of estoppel in pais, may be appealed to and applied as a defense, although, in strictness, the term 'waiver' is

used to designate the act, or the consequences of the act, of one party only, while the term 'estoppel in pais' is applicable where the conduct of one party has induced another to take such a position that he will be injured if the first be permitted to repudiate his act. In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable, where there have been acts on the part of the state which in terms amount to a waiver. The conduct of a state may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon, and that the right to declare such forfeiture is waived."

This principle contravenes the contention of the United States that the Oregon Central Railroad Company of Salem (East Side), incorporated April 22, 1867, was not a legal corporation when the legislative assembly on October 20, 1868, designated that Company as a beneficiary of the grant of July 25, 1866.

Estoppel is defined by Mr. Bigelow in 16 Cyc 679, as follows:

"In the broad sense of the term, estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers,



or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*."

This same author defines estoppel by conduct as follows:

"If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist. \* \* \*

"By the earlier usage matter *in pais* commonly meant matter of fact as distinguished from matter of record. In the law of estoppel, however, it meant, and still means, matter of fact as distinguished from matter of record or conventional writing. 'Estoppel *in pais*' therefore includes all forms of estoppel not arising from a record, from a deed, or from a written contract."

In *Sly v. Hunt*, 159 Mass. 151, the court defines estoppel to be

"An admission or determination under circumstances under such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies.

The reason why an estoppel is so-called is, as stated in Coke Littleton, 352a:

"Because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth."

It is not a rule of evidence, but is a substantive principle of law, founded upon equitable considerations, and is, as we shall presently show, applicable alike to individuals and to the government.

The distinction between waiver and estoppel is well expressed in 40 *Cyc.* 255, as follows:

“While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make a distinction between waiver and estoppel which will give to each a clear legal significance and scope, separate from and independent of the other, as they are frequently used in the cases as convertible terms, especially as applied to the law of insurance contracts and in the avoidance of forfeitures. There are, however, several essential differences between the two doctrines. Waiver is the voluntary surrender of a right, estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do, estoppel depends rather upon what he caused his adversary to do; waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an estoppel always involves this element. Estoppel results from an act which

may operate to the injury of the other party, waiver may affect the opposite party beneficially. Estoppel may carry the implication of fraud, waiver does not. Estoppel may arise as between consistent remedies; for waiver by election to operate as a bar, the remedies must be inconsistent. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. The most general distinction lies in the fact that the term 'waiver', besides implying an intention on the part of a party to relinquish a right which is not necessarily present in estoppel, refers only to the act or consequence of the act of the party against whom the waiver is sought to be enforced, regardless of the attitude assumed by the other party, whereas estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. The distinction is more easily preserved in dealing only with express waiver, but where the waiver relied upon is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel."

It is also said:

"A waiver takes place where a man dispenses with the performance of something



which he has a right to exact, and is a technical doctrine introduced and applied by the courts for the purpose of defeating forfeitures."

40 Cyc. 254—notes 62-63.

Bearing in mind these distinctions and applying these principles to the consideration of the cases presently to be cited, and to the testimony in the record in support of our contention, it will be found that the courts speak in no uncertain terms the doctrine that the state or the government may be estopped in the same manner and to the same extent as private parties, and that the state or the government may waive its rights or may waive causes of forfeiture inuring to its benefit.

In *State ex rel., Douglas v. School District No. 108*, 85 Minn. 230, the court speaking upon this subject quotes with approval the language of Judge Gresham in *State v. Milk*, 11 Fed. 389, where, in a few words, the doctrine is well stated:

"Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

The case of *State v. Milk*, 11 Fed. supra, in which this language was used, was one where the State of Indiana sued to recover possession of 2868 acres of land. This language has been frequently quoted as an apt and concise statement of the rule.

In *Bain v. Parker*, 77 Ark. 168, the court, construing the rules of law applicable to a condition subsequent, says:

“Conditions subsequent that defeat the estate conveyed by the deed are not favored in law. The words of the deed must clearly show a condition subsequent, or the courts will take it that none was intended; and when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition. Now, if we treat the deed as containing the words referred to, there are still no words of condition in the deed, and no words indicating that the estate should be forfeited if the road was not completed at the date named. These words then import nothing more than a covenant, which upon the acceptance of the deed by the grantee, became binding upon him, and for the breach of which the grantor may recover damages suffered thereby, but the deed remains valid. *Stone v. Houghton*, 139 Mass. 175; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Studdard v. Wells*, 120 Mo. 25; *Bray v. Hussey*, 83 Me. 329; *Stanley v. Colt*, 5 Wall. (U. S.) 119; 1 *Jones on Conveyancing*, Sec. 632, and cases there cited.

“Again, if this provision be treated as a condition subsequent, the facts here show that it was waived. A condition may be waived by acts as well as by express release. Any acts on the part of the grantor which are inconsistent with a claim of forfeiture are evidence of a waiver of the condition. Thus,

where lands were granted to a railroad company upon condition that the road should be completed by a certain time, and after the company's failure to do this the grantor suffered the company to go on and incur further expense in constructing the road without making objection, it was held that the condition was waived. *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 440; *Duryee v. Mayor of New York*, 96 N. Y. 477; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; 1 Jones on Conveyancing, Sec. 699."

In *McClellan v. St. L. & H. R. R. Co.*, 103 Fed. 395, the principle is well stated that a breach of the condition subsequent may be waived by acquiescence, and the court says:

"His acquiescence is pronounced recognition of defendant's right of way in solemn pleadings; his various written notices to the company; his delay of years even after forfeiture; his procurement of the building of a fence that would unmistakably segregate this right of way from the remainder of his farm and place it in the exclusive possession of defendant, are all such clear recognitions of defendant's title, that the bare statement of the case carries its own convictions."

Apply this language to the conduct of the United States, to its affirmative action in the issuance of patents after knowledge of the breach of this alleged condition subsequent, its acceptance of title from the Company, its knowledge of the various



mortgages executed to secure construction funds or to refund indebtedness contracted to secure construction funds, its knowledge of the delayed construction of this road, the expenditure of millions of dollars by the Company in completing the road after the breaches of this alleged condition subsequent, were matters of public record, not only in the Records of Deeds in Oregon, but in the records of the Department of the Interior, communicated to Congress; the action of the various committees of Congress in refusing to forfeit the grant for failure to construct or for failure to perform or keep this alleged condition subsequent—all these things, to which the attention of the Court will be specifically called by the testimony, brings the case clearly within the principle announced by the authorities.

In *State v. Illinois Central R. R. Co.*, 246 Ill. 188, 234, a distinction is sought to be made between contracts entered into by the government in its private capacity, as distinguished from contracts entered into in its governmental capacity. Speaking upon this subject, the court says:

“Counsel for appellee insist that the State is estopped at this late date from inquiring into the correctness of these semi-annual statements; that this charter being a contract between the parties, the doctrine of estoppel will apply to the State here as it ordinarily would to a private party. The rule invoked by appellee on this point applies only to those contracts where the State goes into business

as a partner with individuals or in competition with her citizens. (*Brown v. Trustees of Schools*, 224 Ill. 184; 2 Herman on Estoppel, sec. 1128; 25 Cyc. 1007; 19 Am. & Eng. Ency. of Law,—2d ed.—p. 190). This charter is not within the class of contracts just referred to. If the State, in enforcing this contract, acted in its private capacity as distinguished from its governmental capacity, then the doctrine of estoppel might be invoked. (*Barnard v. County of Sangamon*, 190 Ill. 116; *City of Chicago v. Sexton*, 115 id. 230; *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 id. 25.) But the State in enforcing the provisions of this charter contract, is not acting in its private capacity. The contract has nothing to do with trade relations between private individuals and the government, but is one exempting property from ordinary taxation for an equivalent. The revenue to be paid under this charter is simply a substituted tax,—a special form of taxation (*State v. Railway Co.* 128 Wis. 449,) for the benefit of all the people of the State. In attempting to collect this revenue the State is acting in its governmental capacity, the same as when it is attempting to collect taxes under the general revenue laws. This being so, public policy requires that the State shall not lose through the laches or neglect of its officers. (*People v. Brown*, 67 Ill. 435; *Catlett v. People*, 151 id. 16; *Whittemore v. People*, 227 id. 453.) While cases may arise if such a character that right and justice will require

that estoppel may be asserted even against the State when acting in its governmental capacity, (County of Piatt v. Goodell, 97 Ill. 84; Logan County v. City of Lincoln, 81 id. 156; State v. Jackson, L. & S. R. Co., 16 C. A. A. 345, and note;) no such showing is made here in the bill as will bring this case within that class.

So in the case at bar, the United States made contracts with these railroad companies to do what perhaps the United States could itself have done, that is, to build a railroad that should be a public highway to aid in the protection and defense of the country in time of war; to enable the troops and munitions of war to be carried without charge; to enhance the value of its public lands, and generally to do that, through the instrumentality of a private corporation, which in its capacity it could do as a government.

In passing these acts of Congress, the United States did not enact a law applicable to all citizens or one in its governmental capacity. While these acts of Congress were laws and contracts as well, it was because in the nature of things the contracts could not be otherwise executed than in the form of a statute applicable to a particular corporation, and the contract is essentially one made by the United States in its proprietary capacity in so far as the title to these lands is concerned. But it may be urged that inasmuch as contracts can



only be made by or pursuant to an act of Congress, that the non-action of Congress cannot be considered as in anywise modifying or discharging the contract when made. This principle, even if sound, can have no application to a case where, in equity, a waiver of an alleged breach of a condition subsequent is sought to be shown, or the doctrine of estoppel is sought to be applied to the government.

In *Abbott v. N. Y. etc., R. R. Co.* 145 Mass. 450, 459, Mr. Justice Holmes says:

“It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessor as having a good title to the road, and as having possessed the powers which they assumed to exercise. The Commonwealth has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought the plaintiffs have acquiesced in the same view, while the road over their lands has been in public operation. Meantime the mortgage was made, and the bonds were sold in the market. We think that courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will, when for so long a time everything has been conducted upon that footing. But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, and Erie Rail-

road Company must be taken to have had the power and right to make its location of July 30, 1866."

In *McCauley v. Brooks*, 16 Cal. 11, 27, Mr. Justice Field, speaking for the Court, says:

"The Legislature at the time interposed no objections of the kind. It may well have thought that, as the additional stipulations imposed no additional burdens, the release of the claims secured by the contract was an advantage which it preferred to retain; and may have been satisfied with the security of the bond against any public inconvenience from a possible transfer of the lease. At any rate, the contract was acquiesced in and affirmed; the lessee took possession, maintained the convicts and erected valuable improvements upon the premises, and the State, until the twenty-sixth of December, 1857, paid the monthly instalments stipulated. After such acquiescence and part performance, objections to the form or provisions of contract cannot be raised.

"We do not admit that an affirmation of a contract entered into by the agents of the State, upon a subject within the constitutional control of the Legislature, can only be made by direct legislative action, in terms designating such contract. On the contrary, such affirmation may be justly inferred from legislation indirectly referring to the contract, or proceeding upon its assumed validity. Thus, in the Act of April 7th, 1856, appropriating

moneys to defray the expenses of the prison up to March 28th, passed after a copy of the contract with Estill had been transmitted to the Senate, the Legislature recognized the existence, and in effect the validity of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the State from all liability for such supplies 'furnished *after the leasing* of said prison by the Board of Commissioners under an act passed at this session of the Legislature.' That provision was manifestly adopted upon the supposition that the responsibility for supplies furnished subsequently to the time the prison was received by the lessee, had devolved upon him, and that the contract for the leasing, imposing such responsibility, was valid and binding. (See Journals of the Senate of 1856, page 658; Laws of 1856, chap. 72.)"

In *Grogan v. San Francisco*, 18 Cal. 590, 609, Mr. Justice Field says:

"A private proprietor, having full power over his own property, may ratify an authorized sale of the same made by a person assuming to be his agent, without reference to its mode, whether made publicly or privately; he may in some instances be estopped from denying the act of the assumed agent, after appropriating its benefits with knowledge of the facts. So the State may ratify the acts of her agents upon a subject within the constitutional control of the Legislature, when they



exceed their powers. She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity. The reason is obvious; there is no limitation as to the mode in which the State may give her assent, except that it must be an act or resolution of her Legislature."

In *State v. Executor of Butts*, 3 Ohio 309, 319, the Court, speaking of a contract made by the State, says:

"We agree that she can only do so upon the same terms, and subject to the same restrictions as a private individual. When she appears as a suitor in her courts, to enforce her rights of property, she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property, is subject to those rules of justice and right, which, in her sovereign character, she has prescribed for the government of her people.

"If she makes herself a party to the contract of her unauthorized agent, by ratifying his acts, she must take the contract as he has made it, and stand by all its provisions. If its inherent vices are such as to prevent its being enforced for an individual, it cannot be enforced for her."

In *C. R. I. & P. R. R. Co. v. Grinnell*, 51 Iowa 476, 485, the court construed the grant of lands made by act of Congress of May 15, 1856, and the amendatory act of June 2, 1864, and the

facts under which it was claimed that the Company was not entitled to the land. Speaking to the point, the court says:

“The railroad was not completed within the time limited by the congressional grant. It is insisted that plaintiff’s title is defeated under this condition. But it will be observed that the title under the grant vested in the grantee upon the line of the road being definitely fixed and the indemnity lands being selected. The condition requiring the road to be constructed within a time prescribed was subsequent. It could be waived by the grantor, and a failure to enforce a forfeiture and the final certification of the lands would be regarded as a waiver. The United States having failed to enforce to forfeiture, no other party can; the title, therefore, remains unimpaired in plaintiff. *Schulenberg et al. v. Harriman*, 21 Wal. 44; *Tucker v. Ferguson*, 22 id. 527; *Barrett v. Brooks*, 21 Iowa, 144; *Keltner v. Story County*, 28 Id., 35.”

In *Chicago, St. Paul etc., Ry Co., v. Douglas County*, 134 Wis. 197, 205, the Court says:

“Perhaps no other technical legal term is more loosely used than the term “estoppel.” It is used sometimes to merely indicate the existence of an ordinary prior paramount right in the opposite party, or a general rule of law, as where it is said that the state cannot be estopped except by a valid act of the legislature. (*Alexander v. State*, 56 Ga. 478); or to indicate the conclusive effect of a judg-

ment, or express the rule of law that courts will not enforce a demand contrary to public welfare or morals, or the rule of equity that he who hath committed iniquity shall not have equity, or that suitors who invoke relief from a court of equity must come into court with clean hands, or waiver, or acquiescence. Quite uniformly it is held to apply only to matters of fact; but cases are not wanting in which one is said to be estopped to set up a right under the constitution, or to take inconsistent legal positions, or to deny that he is an officer *de jure* in a criminal prosecution for acts done as such officer. *State v. Stone*, 40 Iowa 547; *People ex rel Dunn v. Bunker*, 70 Cal. 212; 11 Pac. 703; *U. S. v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1. It has been denied and affirmed with equal confidence that an equitable estoppel can be applied to the government. *People v. Brown*, 67 Ill. 435; *State v. Bevers*, 86 N. C. 588; *Comm. v. Pittsburg F. & I Co.* 2 Pears, (Pa.) 374; *Montague's Adm'r v. Massey*, 76 Va. 307; *Board Co. Comm'rs v. Dickey* 86 Minn. 331, 90 N. W. 775; *Heidelberg v. St. Francois Co.* 100 Mo. 69, 12 S. W. 914; *U. S. v. Willamette C. & C. M. W. Co.* 54 Fed. 807; *U. S. v. Stinson*, 125 Fed. 907, 60 C. C. A. 615; *Carr v. U. S.* 98 U. S. 433; *People ex rel. Chope v. D. & H. P. R. Co.* 37 Mich. 195. It is, however, quite well settled that when the state makes itself a party to an action or to a contract or grant in its proprietary capacity it is subject to the law of estoppel as other parties litigant or other contracting parties. *Cunningham v.*



*Shanklin*, 60 Cal. 118; *State ex rel. Smyth v. Kennedy*, 60 Neb. 300; 83 N. W. 87; *Stone v. Bank of Ky.* 174 U. S. 799, 19 Sup. Ct. 881; *State v. Ober*, 34 La. Ann. 359; *State v. Taylor*, 28 La. Ann. 460; *St. Paul, S. & T. F. R. Co. v. St. Paul & Pac. R. Co.* 26 Minn. 31, 49 N. W. 303; *Railroad Co. v. Schurmeir*, 7 Wall 272; *Comm. v. Andre's Heirs*, 3 Pick. 224."

In *James v. Germania Iron Co.* 107 Fed. 597, 600, Sanborn, Circuit Judge, speaking for the United States Circuit Court of Appeals for the Eighth Circuit, says:

"The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stat. 395, c. 108, sec. 3; *Rev. St.* secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283."

And speaking upon the subject of estoppel the Court further says:

"In the second place, the United States are the only parties that can claim the ownership or cancellation of this scrip, and they

are estopped from so doing by their patent of the land for cash, by their refusal to take the scrip in payment for it, and by their return of it uncanceled. This scrip was assignable, and Hartmann had the right to rely, and doubtless he did rely, upon the result of these acts of the government, upon the absence of any cancellation or marks of location upon the scrip when he purchased it, and neither the government nor strangers to these transactions can successfully attack the validity of or the title to the scrip on their account. *U. S. v. Winona & St. Paul P. R. Co.*, 67 Fed. 948, 960, 15 C. C. A. 96, 108, 32 U. S. App. 272, 291."

In *United States v. McLaughlin*, 12 Sawyer 179, 200, the Court says:

"Do the principles of equity jurisprudence require, that these patents, in either case, under the peculiar circumstances surrounding them, should be decreed void and vacated? It does not appear so, to us. The interests of all *these* pre-emptioners and purchasers from the government, as well as of the parties holding under the railroad grants, and the interests of public justice, generally, require, that this practical location of the vague, uncertain, impracticable eastern exterior boundary of the Moquelamos grant of 1855, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed—that the government should be now estopped from alleging that it is, or

should be, located elsewhere. That the law of estoppel, in a proper case, applies to the government, see *Clark v. U. S.* 95 U. S. 539, 543; *Branson v. Wirth*, 17 Wall. 42; *Indiana v. Milk*, 11 Fed. Rep. 389, 397, and cases cited."

To apply the principle of law thus announced by Judge Sawyer; suppose that this was a suit to set aside these patents that had been issued from time to time as evidence that the lands have been earned and, as we claim, that the company at the time the patents were issued had performed and was performing all the conditions of the grant; suppose instead of bringing a suit as here, authorized under the joint resolution of April 30, 1908, to ascertain by judicial proceedings whether there had been a breach of this alleged condition subsequent, the United States in its capacity as a proprietor, in absence of an express statute authorizing such suit, or pursuant to the act of March 3, 1887, to adjust these grants had brought suit to set aside and cancel these patents, or if such suit had been brought after an act of Congress had been passed declaring a forfeiture for breach of this condition subsequent, and the United States desired to remove the cloud caused by these patents and sought to remove such cloud by a suit specifically grounded upon the act of Congress declaring a forfeiture and the failure of the company to comply with this alleged condition subsequent, would not the issuance of these patents after these many years,



with knowledge imputed to the United States of the alleged breaches of this condition, be deemed strong and persuasive evidence of waiver, and would not the United States, upon principles of equity, be estopped to question that these titles evidenced an absolute and unconditional conveyance of the title without any reservation, restriction or limitation whatever.

In *United States v. Stinson*, 125 Fed. 907, 909, Grosscup, Circuit Judge, speaking for the Circuit Court of Appeals, Seventh Circuit, says:

“These barriers, to the extent that they are thus artificial, cannot be set up against the government. It has not hitherto been supposed—at least no legislative action has been taken on such supposition—that government needed the spur intended, as between individuals, to bring controversies to a speedy close; or that government would press claims that ought not, by the obliteration of adequate sources of evidence through lapse of time, to be pressed. But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. *Carr v. United States*, 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals.

*Chope v. Detroit Plank Road Company*, 37 Mich. 195, 26 Am. Rep. 512; *Commonwealth v. Andre*, 3 Pick 224.

In *Walker v. United States*, 139 Fed. 409, 412, the Court says:

“United States v. Arredondo, 6 Pet. 712, 8 L. Ed. 547, was a suit, under an act by which the United States consented to be sued, to determine whether certain lands in Florida were private property, or passed to the government by the cession from the King of Spain. The Supreme Court said:

‘By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject-matter.’

“When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors. *King of Spain v. Hullett*, 1 Clark & F. 333; *Rothschilds v. Queen of Portugal*, 1 Young & C. 594. In the latter case, a question arose as to the right of the Rothschilds to retain interest out of a fund in their hands against the Queen. Baron Alderson said:

‘Now, if the conduct of her most faithful majesty, through her lawfully authorized agents, was such as to induce the Rothschilds as reasonable men to suppose that by such delay they were acting in conformity to her majesty’s wishes, they would justly be entitled to charge her with that interest.’

“In *The Newbattle*, 10 Ct. App. Prob. Div.

L. R. 33, the owners of the *Marie Louise* asked that the Belgian government, which had instituted proceedings in admiralty to recover damages for a collision with one of its ships, be required to give security for the payment of damages to defendants, who brought a counterclaim. The order was granted, and affirmed on appeal. Brett, Master of the Rolls, said:

‘If a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against him. The court has never hesitated to exercise its powers against a foreign government to that extent.’

Cotton, L. J., said:

‘When a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders that may be properly made. Regard must, of course, be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order, nevertheless, is a proper one. It is a reasonable principle that a plaintiff, whose ship cannot be seized, and against whom a cross-action has been brought, put the defendant in the position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security.’

‘The Supreme Court of the United States upholds the rights of its citizens against its own government, when it enters its courts against them, quite as far as the courts of England go in enforcing the rights of English subjects in suits against them by foreign



princes. Indeed, it would seem it has gone a little further. There is no statute which authorizes the courts of the United States to seize property of the United States or to enforce liens thereon; yet, in *The Davis*, 10 Wall. 17, 19 L. Ed. 875, property of the United States on board of a vessel, which was seized by the marshal before it came into the actual possession of any officer of the United States, was subjected to a lien for salvage, against the objection of the United States. The Supreme Court said:

'The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor, to assert her claims to the cotton. Under the circumstances, we think it was the duty of the court to enforce the lien of the libelants for salvage before it restored the cotton to the officers of the government.'

"A like doctrine, upon like reasons, was applied in *The Siren*, 7 Wall. 159, 19 L. Ed. 129.

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transac-

tion, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. *Lindsey v. Hawes*, 2 Black, 560, 17 L. Ed. 265; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *U. S. v. Bank of Metropolis*, 15 Pet. 392, 10 L. Ed. 774; *Sinking Fund Cases*, 99 U. S. 719, 25 L. Ed. 496; *U. S. v. Barker*, 12 Wheat. 559, 6 L. Ed. 728; *Cooke v. U. S.* 91 U. S. 398, 23 L. Ed. 237; *Duval v. U. S.* 25 Ct. Cl. 60; *Hartson v. U. S.* 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the principle, if the facts of the particular case will admit of its application."

The case last cited was affirmed by the Circuit Court of Appeals, Fifth Circuit, November 3, 1906, for the reasons given by the Judge in the court below. *United States v. Walker*, 148 Fed. 1022.

In *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 40, Severens, Circuit Judge, speaking for the Circuit Court of Appeals,

Sixth Circuit, then composed of Circuit Judges Lurton, Severens and Richards, grounded his opinion and the judgment of the court upon principles of estoppel. After noting the fact that no action had been taken by Congress for the construction of any works or the removal of any obstructions at the place which would be affected by the existence of the islands, the court says:

“Thus far we have considered this question on its strictly legal aspects. The elements of equity in the attack on the Chandler patent are scant. His application was made May 17, 1881. The Land Office had it under advisement until December 15, 1883, when it granted the patent. It does not appear that the particular objection now made was presented by the Commissioner. But the matter of the reservations in the locality, including the land applied for, must have been under his observation, and the issuance of the patent is at least *prima facie* evidence that no valid objection to its issuance was deemed to exist. The Land Office then had, and has continued to have in its possession, the same data for raising the question of the validity of the patent that are made the basis for the contention now made. Upon the faith of the grant, the patentees and his grantee have made permanent improvements upon the land costing from \$135,000 to \$150,000. Following the ancient common-law maxim, ‘*nullum tempus occurrit regi*,’ it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere



delay or general statutes of limitations. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

This case was affirmed by the Supreme Court of the United States in *United States v. Chandler-Dunbar Water Power Co.*, 209, U. S. 447. The Supreme Court of the United States in an opinion delivered by Mr. Justice Holmes, in effect holds that the issuance of a patent which has been allowed to stand for a period of five years after the passage of the act of March 3, 1891 (26 Stat. 1099), without any suit having been brought to cancel or set aside the same, is not only evidence of title, but is title itself.

The judgment of the Supreme Court was not grounded upon the doctrine of estoppel as such, but proceeded upon the theory that when a patent had been issued in due form and in the regular way, whether it was issued by authority or not, and

impliedly, whether or not the patent was issued at a time when the United States could have asserted forfeiture for breach of the alleged condition subsequent, or at least refused to issue the patent and suspend the same, that the United States by this statute of repose had in effect validated the transfer. The language of the act of March 3, 1891, it was pointed out, referred to "any patent heretofore issued," and such language described the purport and source of the document, not its legal effect. And so here, applying the rule of equitable estoppel to the facts in this case, it could have been decided upon equitable grounds that the United States was estopped both by acts *in pais* and because of the issuance of this patent and that it had been allowed to stand unchallenged beyond the period of the bar of the statute. It is for this reason that we insist that the uniform and regular issuance of these patents from 1871 down to 1905, with full knowledge of the way the grants were administered and the sales made, constitute conclusive evidence of waiver and estoppel.

In *Shaw v. Kellogg*, 170 U. S. 312, 331, the court recognizes the non-action of Congress in the face of reports made to Congress by the Surveyor General of the property, and applies the principle of estoppel by silence and acquiescence, although not using these words.

In *Commonwealth v. Turnpike Co.*, 153 Pa. St. 47, 54, the Court says:

“In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that while time will not run against the crown, yet time, together with other elements, may make up a species of fraud and estop even sovereignty from exercising its legal rights.”

Speaking of the case of Attorney General v. The Delaware and Bound Brook Railway Co., 27 New Jersey Equity, 1, the Court further says:

“In that case it was held that where a party acting bona fide, and upon its not unreasonable construction of a public grant, has been permitted to expend a large sum of money in the construction of a public work, in the confidence that it possessed all requisite legislative authority, without a word of protest or remonstrance till the work is practically completed, equity will refuse its aid, even to the state, leaving it to its remedy at law. It was said by the chancellor in that case: ‘The work has been, from its commencement, a matter of public notoriety, and yet no action has been taken on the part of the state authorities, nor even any warning offered by them against the work. The defendants have been permitted to make their immense expenditure upon their enterprise in the confidence of their convictions that they possessed all requisite legislative authority without even a



word of protest or remonstrance. Under such circumstances, equity will refuse its aid, even to the state, leaving it to its remedy at law.' ”

In the case under consideration, the United States, by its proper officers, in execution of the act under which these lands were granted, appointed Commissioners to examine the sections of road, from time to time. These Commissioners reported to the Department of the Interior as required, and the Secretary of the Interior in turn reported to the President, that the company had constructed the road in accordance with the act, and recommended the acceptance of the constructed portions and the issuance of patents for the lands. This was done with knowledge that the company had in its attempt to administer these grants failed to sell these lands to actual settlers under the limitations of the “actual settler” clause, and that it was expending and was expecting to expend millions of dollars to complete construction of road and earn the lands. How can the United States equitably and in good conscience,—after having this induced the expenditure of these vast sums of money, after thus having induced the company and its bondholders to believe that it had earned and was earning these lands, and that the title to the lands was indefeasible,—now be heard to say that during all this time they were violating the terms under which the title was conveyed to them, that they did not earn the grant, that it was

subject to forfeiture at the very moment they were proceeding to earn the title to these lands? And now, after more than forty years have elapsed, large sums of money have been expended upon the faith of the full and complete title thus conveyed, after payment of large sums of money in taxes under the recognition of this title by the state in which the lands are situated, the exercising of the taxing power of the state without regard to the limitations or restrictions of the "actual settler" clause, would it not be unconscionable for the United States now to be able to say that these lands are forfeited. A private person under such circumstances would have no standing in a court of equity.

As we have seen, the United States stands in the same relation as any private suitor, and must be governed by the same principles of equity which obtain and control the conduct of private parties.

In *Magee v. Doe*, 22 Ala. 699, 718, the court says:

"The Price claim was inchoate and incomplete, and its location and survey were provided for by the acts of 1822 and 1829 (3 U. S. Statutes at Large 700; 4 ib. 359;) and as by this survey the south line of the Orange Grove tract, as run by Collins and Henshaw, was adopted as the north boundary of the Price grant, and the United States and the Kennedys having agreed to this survey, they must be regarded as parties to the selection

of the land according to it, and are mutually bound and respectively estopped by it. *Menard v. Massey*, 8 How. 293, 313.”

Here, long after the alleged breaches based upon which the United States now seeks to forfeit these lands, the company paid large sums of money to the United States, as costs of survey, and in other ways relied upon the title which it thought it had earned, and to which it confidently believed it was entitled.

See also, *Menard v. Massey*, 8 How. 293, 313, where the Court makes use of this language:

“This consideration depends on the fact, that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it.”

To the same effect:

*Lessieur v. Price*, 12 How. 59, 76

*Lindsey v. Hawes*, 2 Black, 554, 560

In *United States v. Winona, etc., R. R. Co.*, 165 U. S. 463, 474, the court says:

“The land was free from all individual claims. It was within the absolute control of Congress. It belonged to the Government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the Government now asks to have that set



aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts.

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“Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the

letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be *conclusive* against the Government, and this notwithstanding any *errors, irregularities* or *improper action* of its officers therein."

In *United States v. Winona & St. Paul R. R. Co.*, 67 Fed. 948, 955, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, particularly emphasizing the conclusive effect of the patent issued by the United States, says:

"All the lands certified for the Winona Company were within the place limits of its grants. The grants were in *praesenti*, and they attached upon the filing of its maps of the definite location of its line opposite to the lands. The certificates were evidence that the officers of the land department had adjudged that the grants to the Winona Railroad

Company had attached to the lands in controversy, and their legal effect was the same as though patents to the state had been issued for the benefit of that company. *Frasher v. O'Connor*, 115 U. S. 102, 116, 5 Sup. Ct. 1141; *Curtner v. U. S.* 149 U. S. 662, 675, 13 Sup. Ct. 985, 1041. A patent issued by the officers of the land department of the United States in a case within the scope of their power or jurisdiction, is dual in its effect: it is an adjudication of those officers that the patentee *is entitled to land under the laws of the United States*, and it is a conveyance of the title to that land to the patentee. By the Act of March 3, 1849 (9 Stat. c. 108, p. 395, sec. 3; Rev. St. sec. 441), the secretary of the interior is charged with the supervision of the public business of the United States relating to the public lands; and by the act of March 3, 1857, *supra*, as amended by the act of May 12, 1864, *supra*, the power was conferred and the duty imposed upon him to indicate the lands granted to the Winona Railroad Company by those acts of congress in all cases. By the act of July 4, 1836 (5 Stat. c. 352, sec. 1; Rev. St. sec. 453), the commissioner of the general land office is required to 'perform,' under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all (agents) (grants) of land under the



authority of the government.' The land department of the United States, then, including in that term the secretary of the interior the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far *complied with its conditions* that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it."

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"In all these cases the land that was the subject-matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or

homestead laws, under grants for railroads or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack; *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlan*, 104 U. S. 420, *Smelting Co. v. Kemp*, 104 U. S. 636, 645, 647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030."

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"Moreover, the acts of congress under which the Winona Company claimed these lands expressly provided, as we have seen, that the secretary of the interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In other words they could have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts

granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally, the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the acts of congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which the acts of congress authorized and required them to decide,—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the state and its grantees.

“The next question is whether or not the United States had any equitable right to these lands superior to that of bona fide purchasers who acquired the legal title to them from the railroad company before the government gave any notice of the mistake of its officers, or of its claim to recover the lands. This is not a debatable question. The equities of the United States appeal to the conscience of the chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. Bona fide purchasers are the especial favorites of courts of equity. In *Boone v. Chiles*, 10 Pet. 177,



209, Mr. Justice Baldwin in delivering the opinion of the supreme court, said: 'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Sugd. Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief, (9 Ves. 30-34), which a court of equity imparts liberally.' "

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"The equitable right of the United States to recover these lands is not exceptionally strong in this case. If its land department had decided that the railroad was not entitled to them when it decided to the contrary, the company would have been entitled to an equal number of acres within its indemnity limits in lieu of them, so that the company obtained no more land than it was entitled to, although what it did obtain was undoubtedly somewhat more valuable than the land within its indemnity limits which it should have received. But the right of the government, in order to secure this difference in value, to recover these lands now, when lands in lieu of them can no longer be found within the indemnity limits to fill this grant, when the certificates of its land department have stood unchallenged for from 13 to 18 years, and when purchasers under

these certificates have bought, improved, and paid taxes on these lands, is far inferior to the equities of such purchasers, and ought not to prevail against them."

The case last cited was affirmed by the Supreme Court in *United States v. Winona, etc. R. R. Co.*, 165 U. S. 463, *supra*, but not upon the distinct grounds expressed by Judge Sanborn, although his reasoning is not disapproved.

In *Maxwell Land-Grant Case*, 121 U. S. 325, 381, the Court says:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles depending on these official instruments, demand that the effort to set them aside, to annul them, or to correct mis-

takes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the title by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

The United States and the companies have acquiesced in the construction of this clause as practically administered by the company for more than forty years. If the acts of Congress were formal deeds to these lands made by one private party to another and the parties had acquiesced in the practical construction of the deeds and in the administration of sales contemplated by the deeds, in the same way and for the same length of time as the parties here, could there be any question but that the practical construction thus given to the contracts by the parties would be taken to be the proper construction of the actual settler clause, and if not the technical and proper construction that would have been given to the act in the beginning, the grantor, in this case the



United States, would now be estopped to dispute the construction acted upon by the parties.

In *Irwin v. U. S.*, 16 How. 513, 523, the court recognizes this principle, where Mr. Justice Grier, speaking for the court, says:

“We are of the opinion, therefore, that a reasonable construction of the deed to the United States, having reference to the principles of hydraulics, necessarily requires that each party should have half the water, and conduct it in such pipes as they see fit and proper; and also, that assuming the deed to be capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction having been acquiesced in by all parties interested for sixteen years, is conclusive.”

In *State v. Railroad Company*, 89 Mich. 481, affirmed for want of jurisdiction in 152 U. S. 363, the Supreme Court of Michigan says:

“That the State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well-adjudicated cases.

“In Massachusetts, in the year 1825, the commonwealth was held estopped from setting up alienage in a grantee to whom it had conveyed land. *Com. v. Heirs of Andre*, 3 Pick. 224. In that case the state had conveyed the land by deed to Andre. The court held:

‘This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The common-

wealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country.'

"It has been held that the United States government was estopped from disputing certain boundary lines, and from denying that certain lands were within them. *U. S. v. McLaughlin*, 30 Fed. Rep. 147. The court in that case said:

'A construction of the law and understanding of the facts, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed. The government should be now estopped from alleging that it (the boundary line) is or should be located elsewhere. The law of estoppel, in a proper case, applies to the government.'

"In *State v. Milk*, 11 Fed. Rep. 389, it is said:

'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.' See, also, authorities there cited.

"Where the state granted its land as a part of a wagon-road grant, which had been conveyed to the state under the swamp-land act, it was held estopped to deny that the land was within the wagon-road grant. *Cahn v. Barnes*, 5 Fed. Rep. 326. In that case the state first granted the land to the plaintiff as wagon-road land, and subsequently conveyed it to the defendant as swamp land.

"The case of Hough v. Buchanan, 27 Fed. Rep. 328, arose under the swamp-land act, and the act of Congress granting certain lands to the state of Iowa to aid in the construction of railroads. That case is the exact parallel of this, so far as the indemnity lands are concerned. The complainants obtained their title from the railroad act, and the defendant claimed title under the swamp-land act. After reciting the facts, the court said:

'If, under these circumstances, it should now be held that the state is not debarred from asserting a claim to these lands under the swamp-land act, it is clear that a fraud would thereby be perpetrated upon the company and its grantees. Should it, however, be held that it was open to the state, or its grantees, to contest the validity of the transfer to the railway company, such contest must certainly be made within a reasonable time. The county, upon its organization in 1859, caused these lands to be listed as swamp lands, and the list was forwarded through the proper channels to the department at Washington. The Commissioner refused to certify the lands under the swamp-land act, holding, as a matter of law, that the certification made thereof in 1858 to the railway company defeated the right to claim them under the swamp-land act. It does not appear that the county or its grantees have since taken any further action in the premises. They knew that the lands had been certified to the railway company in 1858; that the Commissioner of the Land-Office had refused to certify the lands under



the swamp-land act; that the railway company and its grantees were claiming the land, and asserting title thereto by paying taxes assessed thereon; and yet for 25 years the defendant and his grantors have done nothing to perfect the evidence of their title, or assert any right to the land. Certainly their claim must be regarded as stale, and not entitled to favorable consideration at this late day.'

"In *Pengra v. Munz*, 29 Fed Rep. 830, the question raised was similar to that in *Cahn v. Barnes*, *supra*, and the same rule was enunciated.

"In *U. S. vs. Railway Co.*, 37 Fed. Rep. 68, it is said:

'Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it.'

"In *Attorney General v. Ruggles*, 59 Mich. 124, the State asked for the cancellation of certain certificates for the purchase of agricultural college lands. There, as here, counsel for the State sought to make a distinction in the doctrine of estoppel as applied to the State and individuals. But this Court, speaking through Mr. Justice Morse, said:

'I see no reason to distinguish this case although the State is a party, from like cases between individuals.' "

In *United States v. M. K. & T. Ry. Co.* 37 Fed. 68, 70, Mr. Justice Brewer says:

“Again, it is insisted that the road was not built on the line of the definite location, but deflects in some instances there from, and near the city of Humboldt to the distance of two miles and a half, and has been since that time operated on the line as built. Hence, by reason of its first failure to construct, and its subsequent failure to operate and maintain on the line of definite location, it is insisted that the grant never became operative, and the officers of the land department exceeded their powers in issuing patents, and *that there is a breach of a condition subsequent.* It must be noticed that this question does not arise upon an application of the road for patents for these lands, for they were issued in 1873. The department officers then accepted the road as constructed so nearly upon the line as to comply with the conditions of the grant. Fourteen years thereafter, after the land thus patented has been largely, if not entirely, sold by the patentee, this bill is filed. It is obvious that the question presents itself under very different aspects now from what it would then. The executive officers of the government have certain duties of supervision in reference to the execution, of grants made by congress, and when they have acted, and their action has been unchallenged for a long series of years, and rights of property have been built up on the faith of their action, a very clear case should be presented before the titles thus resting for years upon that action are disturbed. In the case from the supreme court, *supra*, it observes:

‘And lastly, while we are not disposed to hold

the action of the officers of the land department of the government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention, and all the means of ascertaining what was right, should be set aside in this case.'

"Again, in the Maxwell Land Grant Case, 121 U. S. 381, 7 Sup. Ct. Rep. 1015, the supreme court makes these comments:

'We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof.'

"These observations of the supreme court admonish me that a patent once issued from the



general government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld, unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more is it true in reference to a patent so old as this. Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it. Now, generally, I may observe in this case that the construction of the various acts is not clear. The elaborate briefs prepared by counsel on each side indicate that the matter of construction is a doubtful one. When the officers charged with the primary execution of the duty of construction have discharged that duty, and placed a certain construction upon those acts, and issued patents in accordance therewith, and that construction has been accepted unchallenged for a long series of years, then the court may well hesitate before it says that that construction was improper, and the patent issued without authority."

While it is true that this case was reversed by the Supreme Court of the United States in *United States v. Mo. etc. Ry. Co.*, 141, U. S. 358, the reasoning by Mr. Justice Brewer is not contraverted. The decision of the case by the Supreme Court proceeded upon

other grounds. The decree of the court below was reversed and the case was remanded with directions to overrule the several demurrers to the bill and to require answers from the defendants upon the facts. This, in effect, is a recognition of the equitable ground upon which the opinion of the court below was grounded.

The case of *United States v. McLaughlin*, 30 Fed. 147, 161, was affirmed by the Supreme Court of the United States in 127 U. S. 428, and, as we have seen, the rule of estoppel was applied to the United States by Judge Sawyer. This is a recognition of the application of the rule in cases in which the United States is a party.

In *Hooper v. Cummings*, 45 Maine, 359, 365, the general rule of law applicable to conditions subsequent is well stated where the court says:

“We may assume that the proviso in the deed created a condition subsequent, and, in this, we are sustained by most, if not all, the authorities, ancient and modern; notwithstanding it is to be construed strictly and most strongly against the grantor to prevent, if possible, a forfeiture of the estate. ‘If the word proviso be the speaking of the grantor, feoffer, donor, etc., and obliges the grantee, etc., to any act, it makes a condition, in whatever part of the deed it stands; and, though there be covenants before or after, is not material.’ 3 Com. Dig. 84, (Condition).

“And, we may further assume, that the evidence discloses a breach of the condition, inasmuch as

the land has never been fenced on the highway, and has remained in that situation for more than half a century. And, in the mean time, the grantor, living in the vicinity, has permitted the meeting-house to be erected and maintained, and the pews and corresponding portions of the lot to be conveyed to members of the parish, and different periods from the date of his deed to the present time. And all this was done without complaint, or any action on his part to reclaim the land. If ever there could be a waiver of a condition evidenced from the conduct of a party, this would seem to be such a case; certainly, as much so as those cases where a person stands silently by and permits property to be conveyed to which he has a legal claim. Lord Coke remarks, 1 Co. Litt. 218, 'Regularly, when any man will take advantage of a condition, if he may (can) enter, he must enter; and, when he cannot enter, he must make a claim; and the reason is, for that a freehold shall not cease without entry or claim, *and also feoffer or grantor may waive the condition at his pleasure.*' Vide *Willard v. Henry*, 2 N. H. 120, where a non-claim for a much shorter period of time, was held to be a waiver of the condition."

In *United States v. Arredondo*, 6 Pet. 691, 728, a patent issued by the United States purporting to convey lands was early recognized as final. The court says:

"A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *Patterson v. Winn*, 5 Pet. 241. The grants of colonial governors, before the



revolution. have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and *presumed ratification*, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony or province where it lies."

In *Titus v. United States*, 20 Wall. 475, 485, Mr. Chief Justice Waite, speaking for the court, says:

"Very different questions, and very different principles of estoppel, will have to be considered if the United States or the commission shall ever attempt to assert title against the purchasers at the sale. They claim under the sale, and have paid their money in consequence of the offer of the United States to sell in that way.

*Jones v. United States*, 96 U. S. 24, 29, recognizes that estoppel applies in a proper case to the United States, and also recognizes that conditions impossible

to be performed are not binding upon the parties. Mr. Justice Clifford, speaking for the court in that case, says:

“Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. *Chitty, Contr.* 663; *Jervis v. Tompkinson*, 1 H. & N. 208.

“Other defences failing, the petitioner insists that the United States are estopped to deny that the time of performance was extended, as set up in his second assignment of error; but the court is unable to sustain that proposition, as the remark of the head of the bureau does not amount to a contract for such an extension, being nothing more than the expression of an opinion that the assistant-quartermaster would grant the applicant some indulgence.

“Viewed in that light, it is clear that the United States did not do any thing to warrant the contractor in changing his position, and, if not, then it is settled law that the principle of estoppel does not apply. *Packard v. Sears*, 8 Ad. & E. 474; *Freeman v. Cook*, 2 Exch. 654; *Foster v. Dawber*, 6 id. 854; *Edwards v. Chapman*, 1 Mee. & W. 231; *Swain v. Seamans*, 9 Wall. 254.

“Estoppel does not arise in such a case, unless the party for whom the service is to be performed induced the other party by some means to change

his position and act to his prejudice in consequence of the inducement."

In *Minneapolis & St. Cloud R. Co. v. Duluth & Winnipeg R. Co.*, 45 Minn. 104, 106, the Court says:

"It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. The right of the state to a forfeiture must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of its road, before any action on the part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions, as applied to land grants, have become so familiar, especially since the decision in *Schulenberg v. Harriman*, 21 Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless. The intervenor was not in default in any of the conditions of its grant in March, 1878, or for nearly a year afterwards. In 1879, it did default, not having, as the court finds, located its line, or filed a map of it, until the spring of 1882. But the state has never declared or asserted any forfeiture, either by legislative act or by



judicial proceedings, and in the mean time the intervenor has gone on and earned its grant by the construction of its road, so that it is now beyond the power of the state to declare a forfeiture.”

This is, in effect, a recognition of the rule that where the state has a right to declare a forfeiture for breach of condition subsequent, and permits the grantee of an estate thus burdened to proceed with the completion of the work for which the lands are granted, even though the condition has been broken, that then after the performance of the thing for which the grant was made, it is too late for the state to undertake to declare a forfeiture. This road was not completed within the time required by the act under which these lands were earned. That clause in the act was clearly a condition subsequent. For breach of that, before completion of road and acceptance of same, clearly Congress could have declared a forfeiture as to the lands opposite to and co-terminous with the unconstructed portion, and possibly could have declared a forfeiture of the entire grant for failure to construct the entire road. This breach would have determined the estate as much as the breach of the actual settler clause if that shall be construed as a condition subsequent, for breach of which re-entry may be had. If Congress could not declare a forfeiture after the lands had been earned by construction of road, even though there had been a continuous breach of that condition subsequent for many years, it is clear that Congress cannot, after a knowledge of the breach of a condition subsequent

as to the disposition of integral parts of these lands many years after such continuous breaches have been brought to the attention of the United States, declare a forfeiture for such breaches, and particularly where, as here, these breaches occurred before completion of road and before the expenditure of vast sums of money in a bona fide attempt to earn the lands.

In *McCue v. Barrett*, 99 Minn. 352, 355, the Court says:

“Conditions subsequent are to be strictly construed and taken most strongly against the grantor to prevent a forfeiture of the estate. A forfeiture for a breach of a condition subsequent may be waived by acts as well as by express agreement, and once waived the grantor can never take advantage of it; but mere silence of the grantor after the breach is not sufficient to constitute a waiver of forfeiture. A waiver, however, may result from the failure of the grantor for an unreasonable time to act after knowledge of the breach, or where he consents to the breach. 13 Cyc. 689, 708; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9, 57 Am. 59; *Maginnis v. Knickerbocker*, 122 Wis. 385, 88 N. W. 300; 69 L. R. A. 833; *Barrie v. Smith*, 47 Mich. 130, 10 N. W. 168; notes to *Cross v. Carson*, 44 Am. Dec. 742, 746.”

In *Barrie v. Smith*, 47 Mich. 130, 131, the Court says:

“It is familiar doctrine and well settled that ‘conditions subsequent are not favoured in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus*, and in many cases

hardly reconcilable with conscience.' 4 Kent. Com. 129; Mich. State Bank v. Hastings, 1 Doug. (Mich.) 257; Clakins v. Smith's Estate, 41 Mich. 412.

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"It is well settled that a condition subsequent may be waived, where broken, by the party who has the right to avail himself of it, and this may be proven as well by the acts and conduct as by an express agreement, and where once waived it is gone forever. If therefore it appeared that the grantor of the defendant had used these premises or the buildings thereon for the purposes of selling intoxicating liquors, therein, to the knowledge of the plaintiffs, or either of them, and the defendant subsequently purchased the premises, and made valuable improvements thereon without objection, or any steps being taken by the plaintiffs to insist upon a forfeiture, this would constitute a waiver of the condition and forfeiture. Gray v. Blanchard, 8 Pick. 284.

"That the plaintiffs could waive the condition there can be no question, and if they permitted the premises to be used in violation thereof, they could not stand by, see the property change hands, and after valuable improvements had been made thereon, then step in, insist upon a forfeiture, and thus acquire the improvements made upon the strength of their seeming acquiescence."

In *Wisconsin Central R. R. Co., v. Forsythe*, 159 U. S. 46, 60, Mr. Justice Brewer, speaking for the court says:

"Still, again, it must be noticed that the State of Wisconsin, the grantee named in both the acts



of 1856 and 1864, the plaintiff within whose place limits the land in controversy is situated, and the Omaha Company, within whose indemnity limits it is, all three long since agreed that the land passed by this grant, and dealt with it as belonging to the plaintiff. Both roads have been constructed, and, undoubtedly largely through the instrumentality of their construction, population has poured into that part of the State, and the value of all real estate so increased that this particular tract is found by the jury to be worth \$8000. After years have passed, and all the parties interested in the matter, other than the United States, have treated it as the property of the plaintiff, the defendant, relying upon a technical construction of the statutes, seeks to enter the tract, and thus, for no more than the paltry sum of \$400, two dollars and a half per acre being the double minimum price of land within the limits of railroad grants, to obtain title to property worth, as we have seen, at least \$8000. The railroad company, under this construction, loses the land it supposed it was entitled to, which it has treated as its own, and has helped to make valuable; the government does not receive the \$8000, nor indeed anything if the land be entered under the homestead laws, but a stranger comes in, who has done nothing to create that value, and appropriates it to his own benefit. The iniquity of such a result is at least suggestive."

We are not, however, without authority upon this question in this jurisdiction.

In *United States v. Wallamet V. & C. M. Wagon Road Co. et al.*, 42 Fed. 351, Judge Deady says:

“When the United States comes into a court of equity to assert a claim, it is subject, and must submit to, the rules of procedure and principles of jurisprudence which obtain in suits between private parties. *U. S. v. Arredondo*, 6 Pet. 711; *U. S. v. Flint*, 4 Sawy. 58; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 499. \* \* \* The grant, however, was a conditional one, the condition being that the road should be completed in the manner provided within five years from the date of the act. This was a condition subsequent and, unless it was complied with, the complainant as grantor, might, by proper legislation or judicial proceedings, have enforced the forfeiture of the grant on account of such failure.”

It appears that in that case the defendants Weill and Cahn filed two pleas to the bill and their joint and several answers in support thereof. Speaking of these pleas, Judge Deady says:

“The first plea may be called an estoppel.

“Briefly, it alleges that after these defendants had acquired the title to the lands in question, as stated in the bill, and in March, 1878, a complaint was received at the office of the secretary of the interior to the effect that the road had not been constructed as required by the act of July, 1866, in consequence of which the commissioner of the general land office, with the approval of said secretary, appointed a special agent to examine the road, and report thereon; that in October, 1880, said agent reported that the road had not been constructed as required by law; that said

report, and the evidence accompanying the same, was laid before congress, and in the house of representatives was referred to the committee on military affairs, which committee, upon consideration of said report and evidence, and evidence contradictory thereof, made a report in February, 1881, recommending that no action of congress be had in the premises.

"In their report the committee say they 'do not feel called upon to investigate the disputed question of fraud arising from the ex parte testimony submitted, or warranted in expressing an opinion in regard to the same, but believe that to be a matter within the province of the judicial, and not the legislative, department of the government,' and conclude as follows:

(1) That the act of congress approved July 5, 1866, vested a present title to the land in question in the state of Oregon; (2) that by the act of the legislature and the acts of the governors of Oregon, the title to said land was vested in the Wallamet Valley & Cascade Mountain Wagon Road Company; (3) that by the deed of said company to Clarke, and the subsequent deeds from Clarke and others, the title of said land is now lawfully vested in the present claimant, Alexander Weill; (4) that said title cannot be forfeited or annulled, or reinvested in the United States, excepting by a judicial proceeding; and that the same has become a vested right, which congress cannot impair or take away.

"That afterwards, on February 8, 1882, a communication from the secretary of the interior was laid before Congress, containing further charges, and alleged proofs that the road was not constructed as required by the act of July 5, 1866;



and the matter was referred in the house of representatives to the committee on public lands, and in the senate to the committee on military affairs, which committees reported, recommending that congress take no action in the premises. Both of these reports are annexed to the plea, and made a part thereof; and each states that the title to this land passed to the state and its assigns under the act of congress and the state legislature.

“The senate committee say that ‘it is impossible’ for them ‘to make such an investigation as will justify action by congress which would do justice and equity in the premises,’ and that ‘the executive department of the government had ample authority in law’ to investigate the matter, and, if necessary, to institute legal proceedings in the courts of the United States to secure a forfeiture of the grant, or any part thereof, for failure to comply with the terms and conditions thereof, ‘without any legislation or instructions from the legislative department.’

“That by the proceedings thus had the matter of the completion of the road was referred to the executive department of the government, whereupon the secretary of the interior, after due investigation of the subject, including the hearing of argument thereon, did on July 5, 1882, direct the commissioner of the general land office to proceed and certify the lands for patent under the act of June 18, 1874, and thereafter, in October, 1882, said patent for 440,856 acres was duly issued to the wagon road company; that these defendants relying in good faith upon the action of the legislative and executive department of the government, were induced to, and did, before the passage of the act of 1889, ‘so alter and change their

position in reference to said lands' as to 'render it inequitable and unconscionable for the complainant to assert any right \* \* \* to forfeit or reclaim said lands;' that these changes consist, in part, in the expenditure of \$2,660.62 in securing the issue of patents therefor; in the payment of \$29,885.79 of taxes levied thereon; in the payment of \$109,800.97 to agents and attorneys for grading, selecting, and platting said lands, and defending the possession of the same from adverse claimants and trespassers; by the sale of sundry parcels of said lands with warranty of title, on which the liability of the defendants exceeds the sum of \$22,609.71; in the expenditure of \$86,805.75 in rebuilding and improving said road through its entire length, which has greatly increased the value of the lands along the line thereof, a very large portion of which still belongs to the complainant, and in the payment of \$31,651.71 interest on said sums of money, making in all the sum of \$280,754.03."

Speaking of the legal effect of the plea, Judge Deady further says:

"As appears from the first plea, congress has repeatedly refused to declare the forfeiture of the grant, or take upon itself the investigation of the question whether the condition had been complied with or not. The attorney general declined to institute judicial proceedings to that end until required to do so by the act of 1889, which appears to have been passed on the memorial of the legislature of the state. It is also well understood that congress was influenced to the passage of the act by the desire of these defendants to have a speedy and complete determination of their rights in the premises.

“On the facts stated in this plea, the demand made by this suit for the forfeiture of this grant on the ground stated in the bill is what is known in equity as a ‘stale claim,’ and therefore ought not to be allowed. The period prescribed for the construction of this road expired in July, 1871, full 18 years before the commencement of this suit. During all this time, it was open to the complainant to bring suit, by its attorney general, to have this grant declared forfeited on the grounds now stated in its bill. *U. S. v. Throckmorton*, 98 U. S. 70; *U. S. v. Tin Co.*, 125 U. S. 278, 8 Sup. Ct. Rep. 850.

“This, in my judgment, is such a delay or lapse of time as renders the claim stale, and constitutes, under the circumstances, a bar to the relief sought.

“Lapse of time, particularly when coupled with possession, as in this case, is a defense, in equity, in cases not within the reach of the statute of limitation. *Story*, Eq. Pl. Sec. 813; 2 *Story*, Eq. Jur. Sec. 1520; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 449; *U. S. v. Beebe*, 4 McCrary, 12, 17 Fed. Rep. 36.

“For seven years after the expiration of the time prescribed for the construction of the road and filing of the certificates of the governors, in which its completion was formally and officially declared, nothing appears to have been said or suggested to the contrary by any one, when a trespasser on the lands made a complaint to the secretary of the interior that the road had not been constructed according to law. Investigation ensued under the direction of the secretary, and the matter was submitted to congress, who referred it back to the executive department in



1882, where, after due consideration, patents were ordered issued to the company under the act of 1874, which was done, as to the greater portion of the lands.

“The statute of limitations does not ordinarily run against the United States. But this suit is required by the act of congress to be tried and adjudicated as a suit between private parties; and therefore, in my judgment, the lapse of time, or the bar of the statute of limitations, is to have the same effect as in a suit between such parties.

“Since 1878 the analogous action at law, to recover the possession of these lands on account of a breach of the condition on which they were granted, would be barred in 10 years, and prior to that time in 20 years; and although the statute of limitations does not apply, *proprio vigore*, to suits in equity, yet in cases like this, of concurrent jurisdiction at law, the court will apply the same limitation to one as the other. *Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379.

“No case has been cited from the supreme court in which it has been distinctly held that the defense of estoppel can be made against the national government. But in many cases it is so assumed, even where the term is not used.

“For instance, in *Clark v. U. S.*, 95 U. S. 543, it was held that a defense to a claim against the government for the use of a steamboat, which involved bad faith on its part, could not be made.

“In *Branson v. Wirth*, 17 Wall. 39, it is assumed in the opinion of the court that the United States may be estopped.

“In *U. S. v. McLaughlin*, 12 Sawy. 201, 30 Fed. Rep. 147, it was said by Judge Sawyer, ‘that the

law of estoppel, in a proper case, applies to the government.'

"In *Indiana v. Milk*, 11 Biss. 209, 11 Fed. Rep. 389, the court having found that the state, by its conduct, had recognized the validity of the defendant's title, and thereby induced them to alter their position, by investing their money on the strength of it, Judge Gresham said:

" 'The state cannot now, in fairness or law, assert its validity.

" 'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.'

"In my judgment, the complainant ought not, in fairness and justice, to be allowed to assert, as against these defendants, that this road was not completed as required by law, and claim a forfeiture of the grant on that ground.

"In the first place, the certificates of the governors to the completion of the road are the acts of the agent of the complainant. By the express terms of the grant, the governor of the state was authorized and required to determine if and when the road was constructed, as provided therein, and his certificate to that effect is the necessary and only legal evidence of that fact.

"On the faith of these certificates, the truth of which does not appear to have been questioned then, or for long after, these defendants invested their money in their lands.

"By this means the complainant proclaimed to these defendants: 'This road has been constructed according to law. The condition on which this grant was made has been complied with, and the same has become absolute.' And it ought not now

to be heard to allege anything to the contrary, even if it should be true, to the prejudice or injury of those who, like these defendants, have in good faith acted upon such representations as true.

“In the second place, after the investigation in congress and the department of the interior, between the years 1878 and 1882, concerning the effect and verity of these certificates, and the fact of the compliance of the wagon road company with the conditions of the grant, the complainant practically affirmed the right of the company to the lands, and listed the same for patent under the act of 1874, and actually issued such patent for the greater portion of the grant, on the faith of all which these defendants were induced to materially change their position in relation to the property by expending large sums of money thereon and thereabout, including the payment of \$29,885.79 taxes levied thereon by the authority of the state, and \$86,805.75 disbursed in the repair and improvement of the road.

“In addition to the grounds above stated, on which this estoppel ought to be allowed as against the United States, there is the express provision in the act of 1889 to the effect that this suit shall be tried and adjudicated as a suit in equity between private individuals. This direction is without qualification or exception, and, in my judgment, includes the setting up of an estoppel, as well as any other procedure or defense known to equity practice or jurisprudence. By this provision the complainant consents in advance that an estoppel for conduct may be availed of against it in this suit.

“And even admitting, what is denied by the



plea, that their certificates are false in fact, and were procured by the fraud of the wagon road company, and that these defendants had notice of the same when they made the purchase, and therefore the complainant is not estopped to show these facts in any litigation between it and them in which they may be pertinent and material, still, by the deliberate action of the complainant, the inquiry has become immaterial.

“Congress had the same right to waive the performance of the condition subsequent to the grant as to make it in the first place. When, therefore, congress decided by the act of 1874 that patents should issue for these lands in case it was shown by the certificates of the governors of Oregon that the road was ‘constructed and completed,’ in effect it thereby affirmed, for the purpose of the grant, the integrity and efficacy of said certificates, and accepted them as final and conclusive evidence of the performance of the terms and conditions of the grant, or waived the same. Again, admitting that the complainant could as a matter of fact, and notwithstanding the certificates to the contrary, show that the road was not completed in all respects according to law, and that these defendants had notice thereof, still, the complainant having subsequently investigated the question upon evidence taken pro and con thereon and decided, by and through its proper officers, that the grantee or its assignee, the wagon road company, was entitled to a patent for the lands under the act of 1874, either on the ground that the road had been sufficiently constructed, or that under said act the certificates were conclusive of that fact, in consequence of which these defendants made the expenditures and incurred the

liabilities on and about the property as above stated, the complainant would be estopped to show such failure or notice in this suit."

In addition to the plea of estoppel which Judge Deady discusses, it also includes what in equity is known as a "stale claim," resulting from lapse of time. There was a second plea which he held to be good and which contained all the elements of a bona fide purchase. As a result the pleas were both sustained and a decree entered dismissing the bill.

The opinion of Judge Deady was announced May 12, 1890. From the decree in this case and a like decree rendered in the case of *United States v. Dalles Military Road Co.* and *United States v. Oregon Central Military Road Co.*, an appeal was taken by the United States to the Supreme Court of the United States and the cases were reversed.

In *United States v. Willamette Valley and Cascade Mountain Wagon Road Co.*, 140 U. S. 599, 622, speaking of the first plea of Weill and Cahn, Mr. Justice Blatchford, who delivered the opinion of the court, says:

"The first plea of Weill and Cahn was treated by the Circuit Court as a plea of estoppel. On the facts stated in that plea, the court held that the claim made in the bill was a stale claim; and that the delay or lapse of time constituted a bar to the relief sought, and ought to have the same effect as in a suit between private parties. The court also held that the second plea of Weill and Cahn

was good, because it set up all the elements of a bona fide purchase for a valuable consideration; that the certificates of the governors were conclusive as to the fact of the completion of the road; and that the lands could not be forfeited to the United States, even if the certificates of the governors should be proved to have been false and fraudulent. The opinion of the court further says, that the facts stated in the pleas are manifestly true; that it is extremely improbable, under the circumstances, that the defendants Weill and Cahn had notice of the falsity of the certificates; and that, admitting that their falsity might be shown, in conjunction with notice to the defendants of that fact, it would be extremely difficult, in view of the lapse of time and of the absence of any resident population along the line of the road at the time, to make any satisfactory proof on the subject. The opinion then refers, as an authority applicable to the cases generally, to the opinion of Judge Sawyer in No. 1218, *United States v. Dalles Military Road Co.*, 41 Fed. Rep. 493.

“For the reasons hereinbefore set forth in regard to case No. 1218, we are of the opinion that the United States were entitled, on the sustaining of the pleas in the present case, to take issue as to the matters of fact alleged in them; and that the decrees in No. 1248 must be reversed, in so far as they dismiss the bill as to the defendants who put in pleas, and the case be remanded with a direction to allow the plaintiffs to reply to and join issue on the pleas.”



Speaking of the other cases which justify the language just quoted, Mr. Justice Blatchford, says:

“We are of the opinion that the Circuit Court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. It is provided by rule 33 of the Rules of Practice in Equity, that the plaintiff may set down a plea to be argued, or may take issue upon it. This does not mean that the plaintiff is to make thereby such a conclusive election that, if he sets down the plea to be argued and it is sustained on the argument, he cannot afterwards take issue on it. By rule 34, on the overruling of a plea on hearing, the defendant has a right to answer the bill. The object of having a plea set down for hearing is to induce the presentation to the court, as a question of law, of the matters set up in the plea, so that assuming those matters to be true in point of fact, the whole controversy may, perhaps, be determined as a question of law. But this practice would be discouraged, if the plaintiff were not to be allowed, in case the plea be sustained in matter of law, to take issue upon it as matter of fact. Rule 35 provides that, in case upon a hearing a plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill. But there is no restriction put upon the right of the plaintiff to take issue upon a plea after it is allowed on a hearing; and such is the view which has been adopted by this court.”

It is thus seen that the case was reversed upon a question of practice.

Speaking, however, of the law which should govern the case, the court further says:

“It is manifest that, although the act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a full investigation of the facts, and did not intend that the important interests involved should be determined upon the untested allegations of the defendants. They set up, to avoid an actual investigation, staleness of claim, estoppel, laches, the certificates of the governors, and allegations of bona fide purchase. It must be held that, in passing the statute of 1889, Congress gave full effect to its three granting acts and to its act of June 18, 1874, to the reports made by its committees and to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office and other executive officers. An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defence, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defences of stale claim and laches cannot be set up against the government. *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Van Zandt*, 11 Wheat. 184; *United States v. Nicholl*, 12 Wheat. 505; *Dox v. Postmaster General*, 1 Pet. 318; *Lindsey v. Miller*, 6 Pet. 666; *Gibson v. Chouteau*, 13 Wall. 92; *Gaussen v. United States*, 97 U. S. 584; *Steele v. United States*, 113 U. S. 128; *United States v. Insley*, 130 U. S. 263.

“The government has had no opportunity to prove the charges of fraud made in the bill, and there is no proof but the allegations of the pleas as to the bona fides of the defendants, and as to the amounts expended by them in good faith in connection with the roads or the lands. It cannot be properly held that, under the act of 1889, final adjudication can be made, on such pleadings alone, as to the extensive interests involved in this litigation. The claims of the United States cannot be treated as stale claims, in view of the act of 1889, especially as to those portions of the lands which remain unpatented, and as to those certificates of the governors which were false and fraudulent to the knowledge of those who made them and to the knowledge of the several defendants, or in view of the alleged defects of the certificates in cases Nos. 1219 and 1248.”

It thus appears that the Supreme Court of the United States, while holding that the defense of stale claim and laches could not be set up against the government, necessarily ruled that the facts stated in the first plea, called by Judge Deady a plea of estoppel, was a good defense.

Judge Sawyer in *United States v. Dalles Military Road Co.*, 41 Fed. 493, sustained both pleas to the bill of complaint in that case. While ruling that the statutes of limitations would not run against the United States, Judge Sawyer uses this impressive language:

“Had the land grant been made for the same purposes, and upon the same conditions, by a private citizen, and the subsequent action both of



the grantee and grantor been precisely the same as in this case, there can be little doubt, I apprehend, that a court of equity, in view of all the circumstances would, at this late day, refuse to decree a forfeiture, and to restore the lands to the grantor for breach of the conditions subsequent, on the ground that it would be inequitable to enforce so stale a claim against parties who had subsequently purchased, in full view of the affirmative public action, as well as the non-action of the grantor, and thereby had good reason to suppose, that all the conditions of the grant whether in fact well performed, or not, had been satisfactorily performed, *Bowman v. Wathen*, 1 How. 189; *Piatt v. Vattier*, 9 Pet. 416; *Badger v. Badger*, 2 Wall. 93; *Sullivan v. Railroad Co.*, 94 U. S. 811; *Clarke v. Boorman's Ex'rs*, 18 Wall. 509. Whatever is equitable, as between man and man, in their dealings with each other, should, also, be deemed inequitable, as between the United States, and those with whom they condescend to deal, under like circumstances; and, I take it, that the same decree is proper in this case, that would have been proper, had a private party been the grantor, and had he by both his positive affirmative action, and his non-action, for so long a time, given purchasers from his grantee so good reason to believe, that he was fully satisfied with the performance of the conditions of the grant.

“In my judgment, all subsequent purchasers were entitled to rely, implicitly, upon the certificate of the governor, who was alone authorized to determine the fact of the completion of the road; and, especially, after its confirmation by congress in the act, peremptorily requiring patents to issue in all cases where certificates had been, in fact, issued.

If there were suspicious circumstances before the passage of this act, which purchasers might be called upon to notice, the passage of this act, assured them that congress had informed itself of the action of the state, and its grantees under it, and was satisfied as to the full performance of the work, or, at least, if it found any defects or shortcomings, that they were waived, and the work accepted. Martin purchased of the Dalles Company two years after the passage of the act of 1874, and was therefore, a subsequent purchaser. Subsequent purchasers, certainly, had a right to rely upon the action had from time to time by congress, and its agents duly authorized, and the public record of it so made. It is now estopped from alleging the non-fulfillment of the statutory conditions of the grant."

This case recognizes a rule of law particularly applicable to the Union Trust Company, representing the bondholders, securing the unpaid bonds, amounting to \$17,745,000.00, and likewise is applicable to the present holders of the stock of the Oregon and California Railroad Company, which stock was received in satisfaction of the bonded indebtedness that entered into the construction of the road up to 1881; and it will be remembered that under the pleadings and proofs it appears that instead of foreclosure of the outstanding mortgages in 1881, then securing the indebtedness held by the German bondholders, and being a first lien upon both of these land grants, their bonds were surrendered, mortgages satisfied, the original stock cancelled and new stock issued in satisfaction of this indebtedness which secured the construction funds that

up to that date had constructed both roads. This equitably created the owners of that stock—the owners by purchase of both land grants—and they became in law bona fide purchasers of these grants, and as such the Oregon and California Railroad Company is a bona fide purchaser and entitled to stand in the position of such purchaser, and especially to rely upon the action and non-action of the United States as to the administration of these grants as an estoppel. The United States must be deemed to have assented to the construction placed upon the actual settler clause by the company and to the performance of the conditions subsequent, if it shall be so construed, as satisfactory to the United States, and it cannot now be heard to claim a forfeiture for any alleged breach thereof.

These cases have been reversed, as stated, for the reasons stated. The case of *United States v. Willamette Valley and Cascade Mountain Wagon Road Co., et al.*, came on for hearing before Judge Gilbert. After the case was reversed, in 140 U. S. 599, 622, 630, the defendants answered on the merits and the case was heard on exceptions to the answer. Judge Gilbert, discussing the history of the case, in 54 Fed. 807, 809, says:

“To this bill the defendants Weill and Cahn first filed two pleas, with accompanying answers. The first plea set up that the patent of October, 1882, was issued after due examination by the secretary of the interior, and in pursuance of the act of June, 1874, and that said defendants, relying thereon, had paid taxes and other expenses on



said lands, and had sold portions thereof with warranty of title, and that it would be inequitable for the United States to claim a forfeiture of the lands. The second plea averred that in 1871 these defendants, believing that the road had been fully completed, as certified by the governors of Oregon, made purchase of the lands in good faith, and paid therefor \$161,400. The pleas were set down for argument upon their sufficiency, and it was held upon the facts contained in the first plea that the claim of the government was a stale claim, and that lapse of time was a bar to the suit, and that the second plea was good, for that it showed that the defendants were bona fide purchasers. (42 Fed. Rep. 351;) and the bill was dismissed. Appeal was taken to the Supreme Court, and the decision of the circuit court was reversed; the supreme court holding that the defense of laches could not be made as against the government, and that the United States should have the opportunity to file replication, and put in issue the allegations of the pleas, (11 Sup. Ct. Rep. 988). When the case was remanded to this court, the defendants Weill and Cahn, instead of relying upon the pleas, answered the bill upon its merits, and the case now comes before the court on exception to portions of the answer, for impertinence.

“The first exception is to that portion of the answer which responds to the allegation of the bill that the defendant corporation, in constructing the wagon road, was bound to construct the same in the manner prescribed by an existing statute of the state of Oregon, enacted October 14, 1862. The points involved in this exception were ably discussed by Judge Sawyer in the case of *U. S. v. Dalles Military Road Co.*, 40 Fed.

Rep. 114, in which he held that the act of congress of February 25, 1867, granting the lands to the state, and the act of the legislature of Oregon of October 20, 1868, transferring the grant to the defendant corporation, formed the entire statutory contract with the road company, and that in the method of constructing the road the company was entirely unaffected by the act of the legislature of October 20, 1868. No doubt can be entertained of the correctness of that decision, and the first exception is denied.

“The second exception is to the allegation in the answer that long before congress passed the act of March 2, 1889, authorizing this suit, the defendants had entirely rebuilt the road in a substantial manner. It is claimed on behalf of the complainant that a construction of the road by the defendants after the expiration of the time limited in the act therefor comes too late, and will not avoid the forfeiture. This question has also been decided in this court in the previous decisions of this case, (42 Fed. Rep. 351), where Judge Deady upon the authority of numerous decisions, held that the grant from the government was a grant in praesenti, with condition subsequent, and could only be defeated upon breach of such condition, the condition subsequent here being that the road be completed in the manner provided for by the act within five years from the date thereof; and that, if this condition were not complied with, the United States might, by legislative enactment, or judicial proceedings, have enforced the forfeiture; but that, until such action by the government, the title remains in the grantee. It is not claimed that any forfeiture was declared or sought prior to the passage of the act of March 2, 1889.

If the road was constructed at any time before that date, the defendants should be allowed to show that fact, and the exception will be denied.

“The remaining exceptions are taken to the defenses which are, in substance, as follows: That in 1878 complaint was made to the department of the interior that the road had not been built, and thereupon the commissioner of the general land office appointed an agent to report upon the same; that the agent reported that the complaint was true; that in 1880 the report, with the accompanying evidence, was laid before both houses of congress, and referred to the appropriate committees of the same; that the committees, after examination, each reported that no action be taken; that the secretary of the interior thereafter examined the report and evidence, and in 1882 made decision that the evidence showed that the road was properly constructed, and directed the commissioner of the general land office to certify the same for issuance of patent and thereupon patent issued; that the defendants, relying on the result of the investigation and the issuance of the patent, did alter their position with reference to the lands, so as to render it inequitable for the government, after such lapse of time, to assert title to the lands, pleading—First, laches; second, estoppel. So far as estoppel is concerned, these changes consist in part in the expenditure of \$2,660.62; second, by payment of \$29,853.79 for taxes; third, by payment of \$109,800.97 for grading, selecting, and platting lands, and protecting their title; fourth, by selling and conveying portions of the lands with warranty of title. These defenses so pleaded consist of—First, laches; second,



estoppel. So far as laches is concerned, the decision of the supreme court in this case, and in *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485, (reversing 25 Fed. Rep. 804, and *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670, reversing the judgment of the supreme court of Tennessee, and *U. S. v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006), must be regarded as finally settling the doctrine that laches or staleness of claim cannot be set up as a defense to any suit in equity brought by the United States to assert rights vested in them as a sovereign government, unless congress has clearly manifested its intention otherwise.

“It is contended that congress has expressed a contrary contention in this instance by providing in the act of March 2, 1889, which authorizes the prosecution of this suit, that it shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried; and it seems difficult to give any meaning to these words without giving them the construction contended for; but, in the light of the decision of the supreme court in this case, it must be held that the ‘other suits in equity’ to which reference is made are suits in which the United States is a party, and that it was not the intention of the statute that the defendants in this suit should avail themselves of defenses not open to defendants in other suits brought by the United States.

“These portions of the answer, however, set up matter by way of estoppel, and it remains to be considered whether that defense is applicable to this case. The government is not ordinarily bound by an estoppel. While individuals may be estopped

by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped. *Com. v. Andre*, 3 Pick. 224; *Cahn v. Barnes*, 7 Sawy. 48, 5 Fed. Rep. 326; *State v. Milk*, 11 Fed. Rep. 397; *Pengra v. Munz*, 29 Fed. Rep. 830; *Woodruff v. Trapnall*, 10 How. 190. No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches. It is held that laches is not imputable to the government upon grounds of public policy. The common law rule that no lapse of time can bar the right of the king is not recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance

would not save the public from loss; but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in *Woodruff v. Trapnall* that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.

“If it be true that the matters involved in this suit were investigated, as set forth in the answer, and the patents were thereafter issued, and the defendants, assuming that such action was a final determination of the question of title, and relying on the same, made the expenditures they claim to have made, the government should be estopped from enforcing the forfeiture. The Supreme Court, in reversing the decree in this case, and remanding the cause, expressly refrained from deciding the questions involved in the controversy, but reversed the case, that its merits might be investigated; and I hold it to be in harmony with the construction thus given by the supreme court to the provisions of the act of March 2, 1889, as well as conformable to the general principles of equity that should govern the trial of this and all similar cases, to allow the defendants the benefit of all the defenses here pleaded.”

The opinion of Judge Gilbert, just quoted, was delivered May 18, 1892. On December 16, 1892, Judge Gilbert disposed of the case on the merits and in the course of his opinion in *United States v. Willamette Valley and Cascade Mountain Wagon Road Co.*, 55 Fed. 711, 718, says:



“On exceptions to parts of the answer it was held that the defense of estoppel as pleaded therein was available to these defendants as against the United States, and it is unnecessary here to repeat the reasoning or the authorities upon which that conclusion was reached. 54 Fed. Rep. 807. It is shown by the evidence that the defendants relied upon the action of congress as expressed in the act of 1874, directing the issuance of patents, its subsequent treatment of the complaint against the road, and its report that no action be taken, the result of the investigation by the secretary of the interior and the subsequent issuance of patents, and that in consequence thereof they altered their relation to the subject matter of this suit by expending large sums in repairing the road, in paying fees to the government, in payment of taxes, and expenses of caring for the lands, amounting in the aggregate to \$142,315.38.

“These facts render it inequitable that the United States should at this late date, and after such long nonaction and acquiescence, assert title to the lands, or claim a forfeiture of the same for a failure to construct the road within the five years succeeding the land grant of July 5, 1866.”

It thus appears in that case that the road should have been completed by July 5, 1871. The suit to forfeit the grant was commenced August 29, 1889,—a period of 18 years after the cause of forfeiture arose.

In the case at bar the breaches of the actual settler clause are shown to have continued from the beginning of the administration of the grants, and that the actual settler clause was, in fact, not observed at any time.

It appears from the proofs also that sales began in the early seventies and continued without interruption down to 1905. That deeds evidencing these sales were placed upon the public records in the various counties in which the lands sold were situated, and that as early as 1879, pursuant to an Act of Congress requiring these reports, the company reported the transactions of the Land Department upon blanks furnished by the Interior Department, which showed sales continuously made without regard to and in violation of the actual settler clause. Notwithstanding this the United States, although passing the General Forfeiture Act of September 29, 1890, by which the United States forfeited all lands opposite to and co-terminous with the unconstructed portion of any railroad to which the lands had been granted, and notwithstanding Congress had changed its policy in respect to the settlement of lands of this character by the Act of June 3, 1878, and notwithstanding the policy of adjustment of railroad grants directed by the Act of March 3, 1887, and notwithstanding the completion of construction of this road after the time limited by the Act, and the expenditure of large sums of money by the Oregon and California Railroad Company thereafter, and with full knowledge of all of these breaches, did not, until April 30, 1908, take any affirmative and direct action looking towards an attempt to ascertain whether a forfeiture of these grants had occurred by reason of the alleged breaches of the actual settler clause. In other words, from 1870 down to 1908,—during a period of 38 years—no attempt was made by the United States to enforce

the provisions of the actual settler clause. Congress was silent in respect to the administration of these grants. It permitted the company to rely upon the patents issued to it; to mortgage these lands to secure construction funds or in redemption of construction indebtedness; and to sell these lands at the best market price, to whomsoever would buy, in order to redeem these construction bonds issued to refund same. Under these circumstances, in the face of its own modification of the contract which it made in the Act of July 25, 1866, changing the terms under which the even sections could be taken under non-settlement laws, it seems to us clearly to fall within the reasoning of the rule and within the facts as held to be legally sufficient in the case of *United States v. Willamette Valley and Cascade Mountain Wagon Road Co.*, 55 Fed. 711, 718.

Judge Gilbert in *United States v. Willamette Valley and Cascade Mountain Wagon Road Co.*, 54 Fed. 807, 811, cites the following cases:

- Com. v. Andre*, 3 Pick. 224;
- Cahn v. Barnes*, 7 Sawy. 48, 5 Fed. Rep. 326;
- State v. Milk*, 11 Fed. Rep. 397;
- Pengra v. Munz*, 29 Fed. Rep. 830;
- Woodruff v. Trapnall*, 10 How. 190.

In *Woodruff v. Trapnall*, 10 How. 190, 206, Mr. Justice McLean, speaking for the court, says:

“A state can no more impair by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals.”



Why may the United States withdraw its even sections within the limits of this grant, by the Act of June 3, 1878, known as the Timber and Stone Act, from the limitations and restrictions contained in the contract between the United States and the companies, evidenced by the Act of July 25, 1866, (14 Stat. 239). Why may the United States offer the even sections under the Timber and Stone Act to any one who may care to buy such of these lands as are chiefly valuable for timber, in quantities of 160 acres or less, at the price of \$2.50 per acre, without any settlement or pretense of settlement, or without any residence, and at the same time insist that under the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, the companies must sell to actual settlers in quantities not exceeding 160 acres and at a price not exceeding \$2.50 an acre, lands of the same character in the odd sections. If the United States may thus change its policy in respect to the even sections, thereby impairing or modifying the contract, the companies, from that date, were justified in refusing to observe the provisions of the actual settler clause. This action upon the part of the United States is persuasive to the point that the United States had changed its policy in respect to the settlement of these lands, and in respect to their disposition. This must be considered as especially true, when for 38 years, it has remained otherwise silent and has permitted the companies to expend large sums of money in completing the construction of the road in the belief that the lands were thereby being earned, and has permitted the companies to pay to the state large sums of money

in annual taxes, upon the belief that the grants were being administered and the lands sold in accordance with the terms and provisions of the acts granting the same.

In *Commonwealth v. Andre*, 3 Pick. 224, cited by Judge Gilbert, *supra*, Chief Justice Parker says:

“Without undertaking to decide what would be the effect of the alienage of these heirs under the several treaties which have been cited, we decide the cause upon the ground that the commonwealth, having conveyed the land to Andre, then a French subject, and received the full consideration therefor, cannot reclaim the land from him or his heirs for the cause of alienage in him or them. The deed was made by a committee fully authorized thereto by a resolve of the legislature, and by the deed the commonwealth has covenanted to warrant and defend Andre, his heirs and assigns, against the lawful claims of all persons whatsoever. This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country. But there is no need of resorting to this remedy; for the deed of the commonwealth to the very persons now defending as heirs to Andre, to whom and to whose heirs the grant was made, is, we think, an estoppel against setting up the alienage of those persons as the ground of recovery.”

Applying this principle to the case at bar, how can the United States, after having received the consideration resulting from the construction of these roads, enhancing the value of the even sections of land owned by the United States, after having used this road as a public highway for the transportation of the troops, munitions of war, and property of the United States free of charge and to the amounts of millions of dollars, after having received large sums of money to cover the cost of the survey of these railroad lands, after having issued patents in due course, as required by law, after having permitted the company to pledge and mortgage these lands to secure construction funds, or to refund construction indebtedness still unpaid, after having attempted to adjust, by the Act of March 3, 1887, the rights of all parties to these land grants, after having passed the General Forfeiture Act for breach of condition subsequent as to construction of road, after having acquiesced, with full knowledge of the way and manner in which these land grants have been administered for more than 40 years, how can it be said that the government is not bound, as a private person under like circumstances would now be bound, not to claim a forfeiture of these unsold lands.

In *Cahn v. Barnes*, 7 Sawy. 48, cited by Judge Gilbert, *supra*, Judge Deady held that the state was estopped to deny that the premises were included in the wagon road grant and rested his opinion upon the ground that in 1871 the premises in controversy were selected and approved by the Land Department as a part of the wagon road grant, without objection on the



part of the state or any attempt to show that the lands were swamp. Thereafter, in 1872, the state sold the lands involved to the defendant Barnes as swamp. It was held that he had no title and could not prove title in the state under the Swamp Land Act, because the state was estopped to deny, under the facts, that the premises were within the wagon road grant.

The President of the United States, pursuant to the terms of these acts granting these lands to the companies, appointed Commissioners to examine and report upon the constructed portions of the road. These reports were filed with the Secretary of the Interior. Upon his recommendation the President approved the reports and accepted the roads as having been completed in accordance with the contracts and directed patents to issue to the companies for the lands, as earned. These reports were made from time to time, covering the period of first construction up to period of completion of the road. The first section of the road, (East Side) was completed December 25, 1869, and the first report was made December 31, 1869; filed with the Secretary of the Interior January 26, 1870, and approved by the President January 29, 1870. The last report was filed with the Secretary of the Interior and by him transmitted to the President October 23, 1889, and approved by the President November 8, 1889.

It thus appears that between the acceptance of the first section on January 29, 1870, and the acceptance of the last section November 8, 1889, a period of nearly 20 years elapsed. That during all that time the United

States knew of the way and manner in which these grants were being administered and these lands sold and knew that they were being sold without regard to the actual settler clause in either act, and yet, notwithstanding this knowledge in execution of these acts, the President of the United States, charged with the duty of executing the laws, accepted these roads as having been completed in accordance with the terms of the act and directed patents to issue for the lands earned thereby.

In *State v. Milk*, 11 Fed. 397, cited by Judge Gilbert, *supra*, Judge Gresham says:

“Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals of law, that will exempt them from the doctrine of estoppel.”  
(Citing cases.)

In *Pengra v. Munz*, 29 Fed, 830, also cited by Judge Gilbert, *supra*, it appears that certain land grants were involved. In the course of his opinion in that case, Judge Deady says:

“The state was the grantee in both these grants. It accepted the land as part of the wagon road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon road grant, nor until the grant had lapsed, for want of selection, within the time prescribed.

The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon road, which was then regarded as a meritorious enterprise. For long after this swamp land grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring as it appears, to make its selections under the grants for the benefit of the roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon road land, with its acquiescence, if not active concurrence, and it is now estopped, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp land grant. And if the state is so estopped, so is its grantee, the defendant."

The authorities thus cited and followed by this court would seem to be conclusive to the point that the United States is bound by estoppel or waiver in the same way and in the same manner as a private party in like circumstances would be bound, and that the United States as a suitor stands in the same position as a private party, and its rights must be determined by the same policy which would govern and apply in the case of individuals.



In concluding this discussion applicable to the law, the attention of the court is called to the case of the State of Michigan v. Jackson, L. & S. R. Co., et al., 69 Fed. 116; reported in 16 C. C. A. 345, and to the note found in 16 C. C. A. 353.

The Circuit Court of Appeals, Sixth Circuit, was composed of Circuit Judges Taft and Lurton and District Judge Severens. The opinion of the court was delivered by District Judge Severens. Judge Severens, speaking for the court in that case, says:

“What had preceded in the execution of both grants was very much a matter of administration between the United States and the state, under the statutes of both, upon the true construction of which there had at the outset been doubt and difference of opinion. In such a case the courts will ‘lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.’ U. S. v. Alabama G. S. R. Co. 142 U. S. 615, 621, 12 Sup. Ct. 306. In U. S. v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, it was said that this principle ‘has been applied by the supreme court as a wholesome one for the establishment and enforcement of justice between the government and those who put faith in the action of its constitutional authorities, judicial, executive, and administrative.’ And see, also, U. S. v. MacDaniel, 7 Pet. 1, and U. S. v. Union Pac. Ry. Co. 37 Fed. 551, where Mr. Justice Brewer, at page

555, collected a large number of authorities of the same import, and noted the growth of this principle of law. This is not precisely the ground upon which an estoppel in pais, in its ordinary sense, is based, but the doctrine rests ultimately upon the same rule of reason,—that of concluding the principal by the action of its agents, when such action has been of long continuance with the knowledge of, and without dissent from, the principal, and where other parties have shaped their conduct accordingly and founded their interests thereon. \* \* \*

The state cannot be permitted to say that it has slept during all this long period, and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had made to it so magnificent a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And, while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights.

“With respect to this defendant, the railroad company, it is shown that the state employed the grant made by congress to aid the state as an inducement to the building of the road, and in thus securing a public improvement; that these identical lands were certified to the state as passing by the grant in lists which remained on file in the state’s land office for several years before they were at length patented by the United States to the company upon the completion of the work;

and that the railroad company earned the lands is not questioned. Nor is there any room for doubt that it earned and received them in reliance upon the right of the general government to grant them and give a good title. It was equivalent in substance and effect to a purchase for value, and its good faith is not questioned except by the suggestion that the railroad company had notice by public record that the title was in the state. Here, too, as in the matter of the adjustment of the swamp land grant, the executive officials participated in the appropriation of these very lands to the objects of the grant to aid the state in building railroads. The time has long gone by when the railroad company could obtain indemnity for the lands, and the state has given no sign of dissent until the filing of this bill. The fact that these lands had been certified to the state, to be conferred upon the railroad company of its adoption, and that they had been so conferred, had been manifest from the state's public records for more than 20 years.

\* \* \* The distinction established by these cases and the former, cited as supporting the general rule, is one which we approve as resting on solid grounds of public and private justice and convenience. The principles operating to create the distinction have been many times recognized in the federal courts and in those of other states. A large number of such cases are collected in Bigelow, *Estop.* (4th Ed.) p. 331, in support of the proposition that, in a proper case, an estoppel is applicable to the state. In the case of *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, the state of Michigan filed its bill in the state circuit court against the Flint & Pere Marquette Railroad Company for a purpose similar to that of the pres-



ent bill. The supreme court, when the case reached it, putting aside all other questions, held that the state was estopped by its own conduct from asserting a claim so injurious to the defendant and in emphatic language rejected the bill as having no foundation in equity, justice, or good conscience. The court cites its own previous decision in *Attorney General v. Ruggles*, 59 Mich. 124, 26 N. W. 419, and the following cases from the federal courts: *U. S. v. McLaughlin*, 30 Fed. 147; *State v. Milk*, 11 Fed. 389; *Cahn v. Barnes*, 5 Fed. 326; *Hough v. Buchanan*, 27 Fed. 328; *Pengra v. Munz*, 29 Fed. 830; *U. S. v. Missouri, K. & T. R. Co.*, 37 Fed. 68. To which may be added the more recent case of *U. S. v. Willamette Val. & C. M. Wagon-Road Co.*, 54 Fed. 807, 55 Fed. 711, 718."

In the note to this case, writted by H. Campbell Black, the learned author of *Black on Judgments*, there is a full discussion of the doctrine of estoppel against the state or the United States. It is there declared that according to the doctrines of the English common law, no estoppel in pais could ever be set up as against the crown, and that in this country, in some few of the states, a similar rule has been laid down. Speaking on this subject Mr. Black says:

"But it is well settled, on the highest authority, that when a state waives its sovereign prerogatives, and enters into business relations and makes contracts and has other such dealings with private persons or corporations, it is to be treated as a private person, and subject to all the ordinary rules and principles of law applicable as between two individuals, save only in respect to

its immunity from suit. See *Curran v. Arkansas*, 15 How. 304; *Hall v. Wisconsin*, 103 U. S. 5; *Davis v. Gray*, 16 Wall, 203. And hence, as will abundantly appear from the citations presently to be made, the prevailing opinion is that the state like any private person, may be estopped in a proper case, with only the necessary differences arising from the different manner in which its determinations are manifested and its actions performed. 'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.' *State v. Milk*, 11 Fed. 389. So, also, in *Michigan*, it is established by a line of well adjudicated cases that the state, as well as a private person, may be estopped by its acts, conduct, silence, or acquiescence. *State v. Flint & P. M. R. Co.*, 51 N. W. 103, 89 Mich. 481. Although there is still some uncertainty on the subject of the availability of an estoppel as against the United States, the tendency of the later authorities is to hold that there is no difference, in this particular, between the general government and one of the states. See *U. S. v. McLaughlin*, 30, Fed. 147; *U. S. v. Willamette Val. & C. M. Wagon-Road Co.*, 54 Fed. 807."

The cases of *United States v. Willamette Valley and Cascade Mountain Wagon Road Co.*, 54 Fed. 807, and *United States v. Winona & St. P. R. Co.*, 67 Fed. 969, are cited in support of the doctrine that an estoppel against the United States may be relied upon.

In *United States v. California etc. Land Co.*, 148 U. S. 31, 38, the decision of the court in *United States*

v. Willamette Valley and Cascade Mountain Wagon Road Co., 140 U. S. 599, 630, was again considered. Speaking of this, Mr. Justice Brewer says:

“There was no error in this ruling. The decision of this court, as reported in 140 U. S. 599, was that ‘the decree of the Circuit Court, so far as it dismisses the bill, must be reversed and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas,’ and the mandate which was sent to the Circuit Court recited this direction. That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law; on the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The Circuit Court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter *open for inquiry*.”

It thus appears that the Supreme Court of the United States has in this way directly recognized the doctrine of estoppel as applied to the United States.

A leading case recently decided is that of the State of Iowa v. Carr, 191 Fed. 257, 266, where Sanborn,



Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, then composed of Judges Sanborn, Van Devanter and Pollock, says:

“The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States v. Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States v. Chicago, M. & St. P. Ry. Co. (C. C.)* 172 Fed. 271, 276; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States v. Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; *Herman on Estoppel*, Sections 676, 677; *State of Michigan v. Jackson, L. & S. R. Co.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, 106; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209; *United States v. Walker (C. C.)* 139. Fed. 409, 411, 412, 413; *United States v. Willamette Valley & C. M. Wagon Road Co. (C. C.)* 55 Fed. 711, 717; *Attorney General v. Central Railway Co.*, 68 N. J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a void law after the city has been exercising its assumed powers for only four years, but has levied and collected taxes and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state. *State v. City of Des Moines*, 96 Iowa,

521, 532, 533, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. *Commonwealth v. Bala & Bryn Mawr Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105; *State of Wisconsin v. Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, 515, 32 L. R. A. 391; *State v. Lincoln Street Ry. Co.*, 80 Neb. 333, 114 N. W. 422, 427, 14 L. R. A. (N. S.) 336; *State v. School District No. 108*, 85 Minn. 230; 88 N. W. 751; *Attorney General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1, 24; *People v. Alturas County*, 6 Idaho, 418, 55 Pac. 1067, 1068, 44 L. R. A. 122; *Vermont v. Society for the Propagation of the Gospel*, 2 Paine (C. C.) 545, Fed. Cas. No. 16,920. According to the decisions of the highest judicial tribunal of the state of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof, by acquiescing in the possession, occupation and improvement of it, or of a part of it, by a citizen who claims title thereto by possession and estoppel only. *Corey v. City of Fort Dodge*, 118 Iowa 742, 749, 92 N. W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. *Smith v. City of Osage*, 80 Iowa 84, 89, 45 N. W. 404, 8 L. R. A. 633; *Dillon on Corporations*, Sec. 533; *Audubon County v. Emigrant Co.*, 40 Iowa 460; Page

County v. B. & M. R. R. Co., 40 Iowa, 520; Austin v. Bremer County, 44 Iowa, 155; Adams County v. B. & M. R. R. Co., 39 Iowa 507."

. Among other cases cited by Judge Sanford in cases last mentioned, are—

United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 55 Fed. 711,

United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677

United States v. Chicago, M. & St. P. R. Co. et al., 172 U. S. 271

United States v. Stinson, 197 U. S. 200, 204, 205

In United States v. Stinson, 197 U. S. 200, 204, 205, Mr. Justice Brewer, speaking for the court, says:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land-Grant Case, 121 U. S. 325; Colorado Coal Company v. United States, 123 U. S. 307; United States v. San Jacinto Tin Company, 125 U. S. 273; United States v. Des Moines



etc. Company, 142 U. S. 510; *United States v. Budd*, 144 U. S. 154; *United States v. American Bell Telephone Company*, 167 U. S. 224.

“Second, The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. ‘It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.’ *Maxwell Land Grant Case*, *supra*, p. 381; *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 677; *United States v. Des Moines etc. Company*, *supra*, p. 541.

“Third, It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. *United States v. Burlington & Missouri River Railroad Company*, 98 U. S. 334, 342; *Colorado Coal Company v. United States*, *supra*, p. 313—a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

“ ‘But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.’ *United States v. Marshall Mining Company*, 129 U. S. 579, 589; *United States v. California etc. Land Company*, 148 U. S. 31, 41; *United States*

v. Winona etc. Railroad Company, 165 U. S. 463, 479.

“Waiving any inquiry as to the claim of ignorance on the part of the Government in respect to the matters complained of until shortly before suit, and simply noting the fact that there was fragmentary testimony tending to show notice at about the time of the entries sufficient to put upon the Government the duty of inquiry, we pass to consider the merits of the case. Forty years intervened between the time of the alleged fraud and the commencement of this suit.”

It will thus be seen that while this was a case brought by the government to set aside patents alleged to have been fraudulently issued as to lands fraudulently acquired, the same rule, with even greater strictness, ought to be enforced in a case where, as here, the suit is not brought in terms to set aside the patents issued for many years, commencing in 1871, but to declare a forfeiture from acts de hors, the patents constituting alleged breaches of a doubtful condition subsequent, the effect of which, if sustained, is to reinvest title in the United States and in this indirect way destroy the verity and legal effect of these patents. It will be noticed that in the case under consideration, patents to some of the lands within the limits of the grant of July 25, 1866, were issued when General Grant was President of the United States in the year 1871—42 years ago.

The case just cited is also in point and to the effect that there was testimony in that case tending to show

notice at about the time of the entries sufficient to put upon the government the duty of inquiry. And so in the case at bar, the Government was a proprietor of these lands thus patented in the sense that the Government, if the contention of the United States now made is true, had the right of re-entry as to all of these lands for breach of the alleged condition subsequent, and as such owner it was bound by the same rules of property which bind other owners in the State of Oregon. The United States is bound by the registration imputing notice of the conveyance of these lands by the company; the United States is bound by its knowledge obtained in due course by documents filed in the office of the Secretary of the Interior and in the office of the Commissioner of the General Land Office, such as a deed made of the entire East Side grant of the European & Oregon Land Company; of the trust deed made to Atherton and others; of the various trust deeds made to the Farmers Loan & Trust Company and to the Union Trust Company; of the sales made as shown by the reports to Congress, evidenced by Exhibit "A" to the amendment to the answer and admitted in the "Stipulation as to the Facts," subdivision 21, page 41 to 74, both inclusive, and of various other matters of record. The unusual delay in taking advantage of the alleged breaches, while not a defense in and of itself, is recognized as a circumstance, for, in the case just cited, Mr. Justice Brewer says:

"40 years intervened between the time of the alleged fraud and the commencement of this suit."



He then proceeds to discuss the facts under which it was held that the purchasers from the defendant Stinson were entitled to be protected by a court of equity, and under which it was shown that Stinson acted in good faith; that "the lands, at the time of the entry, were in the forest, with only scanty population within a reasonable distance, and apparently were worth no more than the purchase price. Now that Superior has grown to be a city, they have increased largely in value." And so here, at the time these grants were made, and for 20 years or more thereafter, these lands involved in suit, now chiefly valuable for timber, were not worth the minimum price of \$1.25 per acre. They were unsalable at any price. It was only by exploitation, extremely liberal terms, and by constant effort that the small area of 163,430.28 acres could be sold prior to May 12, 1887. It was impossible for the European & Oregon Land Company, although agreeing to purchase these lands at \$1.25 per acre, to carry out its contract and to sell sufficient of these lands to keep its obligation. That company was compelled to reconvey the lands to the Oregon and California Railroad Company. Within recent years, and since these lands have become valuable by reason of the construction of railroad lines, and because of the demand for timber, the Government comes into Court, under the pretense that they are to be used for settlement purposes, and that they are adapted to such purposes, and seeks to recover these lands because the railroad company has been unable to sell them under the restrictions and limitations of the actual settler clause. The act is one that does not appeal to the conscience of the

chancellor, and if a private party was now seeking to take advantage of a condition in his deed, of the kind under consideration, and the proofs showed that such private party was seeking to recover these lands for the purposes of exploitation or because they were chiefly valuable for timber and not for settlement purposes, that the lands were not adapted to settlement, that his grantor had been unable to make such sales of these lands and that he had known of the grantor's inability to sell in accordance with the settlement laws, and that the grantor had from the beginning sold these lands to various persons without particular regard or any regard to the restrictions and limitations of the actual settler clause, it is submitted that no court, under such circumstances, would allow a private party thus to stand by and permit his grantor to pursue this course for a period of 40 years, incur large expenditures on the faith of the grantee's acquiescence, on the faith of the grantee's change of policy, on the faith of the grantee's full knowledge of the way and manner in which sales were made, and then recover these lands for the purpose of withdrawing them from settlement and later placing them within the limits of a great forest reserve or sell them for the timber only.

In *United States v. Chicago, M. & St. P. Ry. Co.*, 172 Fed. 271, 276, Willard, District Judge, says:

"The fact that the complainant in this case is the United States cannot affect the result. In the case of *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, 67 C. C. A. 1, decided in the Circuit Court of Appeals, Eighth Circuit, on

July 28, 1904, the court said at page 677 of 131 Fed., on page 10, of 67 C. C. A.:

“ ‘Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor, with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity.’

“In the case of *United States v. Stinson*, 197 U. S. 200, the court said on page 204, 25 Sup. Ct. 426, 49 L. Ed. 724:

“ ‘While the government, like an individual, may maintain an appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been duly established \* \*

“ ‘Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumption of law and fact that attend the prosecution of a like action by an individual. \* \* \* \* \*

“ ‘Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser for value without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties’.”

In *United States v. Detroit Timber & Lumber Co.*, 131 Fed. 668, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, then



composed of Judges Sanborn, Hook and Amidon, says:

“Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity. In *Boone v. Chiles*, 10 Pet. 177, 209, 9 L. Ed. 388, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court, said:

“ ‘A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Sugd. Vend. 722. Strong as a plaintiff’s equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without any notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34), which a court of equity imparts liberally.’ ”

In *Deseret Salt Company v. Tarpey*, 142 U. S 241., Mr. Justice Field, speaking for the court, says:

“We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, *with the express or implied assent of the government.*”

Non-action of the United States in the particular circumstances of the case will operate as a waiver of the rights of the United States and will estop the United States to claim to the contrary.

In *United States v. Northern Pacific Ry. Co.*, 177 U. S. 435, 441, Mr. Justice Shiras, speaking for the court, says:

“This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expiration of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. *It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed.*”

The facts relied upon as showing waiver, acquiescence and estoppel in the case at bar are so numerous and important that it is difficult to summarize the same without possible omission of some fact or circumstance

that may be controlling. Such facts, however, may be briefly summarized as follows:

*First:* Expenditure of more than \$9,000,000.00 in construction of roads from 1870 to 1873—197 miles to Roseburg and 47½ miles to McMinnville. (Subdivision V, Stipulation as to the Facts. Vol. IV pp. 1560-1562 Transcript)

*Second:* Surrender of all the first mortgage bonds and securities and cancellation of same on account of principal and interest due, in May, 1881, by the bondholders, and their acceptance of \$12,000,000.00 preferred and \$7,000,000.00 common stock in lieu of foreclosure, thereby making the then purchasers of this stock now owned by the Southern Pacific Company, purchasers in good faith of both land grants as well as both of the constructed lines. (Subdivision VI, Stipulation as to the Facts, Vol. IV pp. 1562-1566 Transcript)

*Third:* Expenditure of about \$5,000,000.00 additional construction funds secured under the mortgages of June 1, 1881, and May 26, 1883, from June 1, 1881, to January, 1884, in constructing about 145 miles of railroad from Roseburg to a point 1¼ miles south of Ashland. (Subdivision VI, Stipulation as to the Facts, Vol. IV pp. 1563-4 Transcript)

*Fourth:* Expenditure of about \$2,500,000.00 between March 28, 1887, and January 3, 1888, in construction of 24,135 miles from a point 1½ miles south of Ashland to the Oregon and California state line, and purchase



by Pacific Improvement Company, assignor of Southern Pacific Company of the stock of Oregon and California Railroad Company, and the guaranty of Southern Pacific Company of the principal and interest of the bonds issued under the mortgage of July 1, 1887, and in accordance with Exhibit No. 9 to the Stipulation as to the Facts, Exhibit No. 1 to the Joint and Several Answers of the Defendants herein, Exhibit "E" to the Bill of Complaint, subdivision VII, item 20, page 25, Stipulation as to the Facts; said Exhibit No. 9 being the agreement of date July 31, 1885, of Oregon and California Railroad Company and Central Pacific Railroad Company, and said Exhibit No. 1 being the agreement of date October 11, 1886, of Central Pacific Railroad Company, Pacific Improvement Company and Southern Pacific Company, and said Exhibit "E" being the agreement of date March 28, 1887, signed by the stockholders' Re-construction Committee of the Oregon and California Railroad Company, the London Bondholders' Committee, and the Frankfort Bondholders' Committee, the Southern Pacific Company and the Union Trust Company.

*Fifth:* Expenditure of \$34,784.85 in advertising these lands; \$142,651.40 in examining, cruising and grading these lands; \$145,977.26 in payment of surveying fees to the United States, and in payment of \$1,827,234.10 in taxes on these lands from April 1, 1870, to April 30, 1911. (Vol. II pp. 914-15 Transcript), defendants' Exhibit 289; (Vol. XIII p. 6836 Transcript) and testimony of Robert Adams, (Vol. V pp.

2137 Transcript); testimony of J. B. Eddy, (Vol. V pp. 2552 Transcript); and defendants' Exhibits 319, 320, 321, 331, 359; (Vol. XIII pp. 7146-7199-7251 Vol. XIV p. 7263—p 7346 Transcript); and testimony of P. A. Worthington, (Vol. V p. 2552 Transcript).

*Sixth:* Expenditure of \$315,828.34, (defendants Exhibit 288, (Vol. XIII p. 6835 Transcript) between 1906 and 1910, and estimated like amount prior to 1906, on so much of this road as lies between Portland and Oregon-California state line, (See testimony of C. P. Lincoln, (Vol. V p. 2126 and J. N. Sherburne, Vol. V, pages 2404 Transcript) all said sums being amount of free movement of traffic for the United States, as required by the Act of July 25, 1866; section 5, (14 Stat. 239); and for the entire line between Roseville Junction and Portland, the amount is more than \$1,250,000.00.

*Seventh:* Issuance of patents conveying title in fee simple, from 1871 down to 1909, and particularly since the Act of September 29, 1890, (26 Stat. 496). (See Exhibit 11 to answer, subdivision XIX, (Vol. II pp. 1152-1154, item 3; Stipulation as to the Facts. Vol. IV p. 1589 Transcript).

*Eighth:* Modification of the contract contained in the Act of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94) made as to quantity to be entered by homestead settlers under these acts, which modification was made by the Act of March 3, 1879, (20 Stat. 472) by which such homestead settlers could enter 160 acres.

*Ninth:* The Timber and Stone Act of June 3, 1878, (20 Stat. 89) being an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870.

*Tenth:* The General Forfeiture Act of September 29, 1890, (26 Stat. 496) being an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870.

*Eleventh:* The Act of March 3, 1891, (26 Stat. 1097) repealing the pre-emption laws, being an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870, and Section 24 thereof, (26 Stat. 1103) which authorizes the President to "set apart and reserve in any state or territory having public lands bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," being clearly an implied waiver of the actual settler clause of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870. The establishment of extensive forest reserves within the indemnity limits of and adjacent to these grants, is conclusive evidence of the timber character of these lands in suit and should estop the United States to claim that the limitations of the actual settler clause in these acts apply to these lands.

*Twelfth:* The act of June 4, 1897, (30 Stat. 1136) contained this provision, "That in cases in which a tract covered by an unperfected bona fide claim or by



a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof, a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent." Under this statute the Land Department accepted title to 10,376.01 acres sold by the company for \$49,769.56, and by direction of the Attorney General in 1907, after the Department of Justice had begun to investigate these lands grants, the Secretary of the Interior suspended selections so pending for 23,012.77 acres sold by the company for \$67,594.69. (See Exhibit 9 to the answer; Vol. II p. 1143 Exhibit No. 17 to Stipulation as to the Facts, Vol. IV pp. 1730-31 Transcript.) The section of the act quoted gave to the grantees of the company the absolute right to relinquish these tracts to the United States and select in lieu thereof any vacant public land. Both the statute and the action of the Land Department waived the actual settler clause in the Act of April 10, 1869, and the Act of May 4, 1870. These lands were all within the Cascade Forest Reserve, and this was likewise a waiver of this clause, even if the company had retained the title to these lands.

*Thirteenth:* The Act of February 10, 1909, (25 Stat. 609), the Act of June 17, 1910, (36 Stat. 531), the Act of June 6, 1912, (37 Stat. 123) all amending the Homestead Act of May 20, 1862, (12 Stat. 392) and the due administration thereof applied to the character and class of lands involved in this suit, chiefly valuable

for timber and unfit for settlement, applied to these unsold lands now owned by the company, would prevent the company from further compliance with the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

*Fourteenth:* The Act of August 20, 1912, entitled, "Public No. 278, H. R. 22002," commonly known as the Innocent Purchasers Act, is a substantial waiver of the alleged breaches of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and is a recognition of the non-settlement character of the lands involved in suit, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were so sold by the company to such purchasers.

*Fifteenth:* Notice of the construction of the companies placed upon the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and of the purposes of the mortgage of April 15, 1870, and of the intention of the company to mortgage said lands to secure construction funds, as shown by the correspondence. Government's Exhibits 109, 109-A, 109-B, 109-C, 109-D (Vol. X p. 5322-5370 Transcript) and which correspondence was brought to the attention of the United States and particularly to the Department of Justice, the Commissioner of the General

Land Office and the Secretary of the Interior, and the non-action of the company in respect to the same, and mortgaging these lands to secure construction funds, from May 20, 1872, to April 30, 1908.

*Sixteenth:* Notice to the United States and acquiescence in the alleged breaches thereby shown, as contained in the reports made by the Oregon and California Railroad Company, required by law, to the Commissioner of Railroads, transmitted to the Secretary of the Interior and by him to Congress and published in the official documents, showing knowledge of and acquiescence in the alleged breaches in the sale of these lands, in violation of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, from December 31, 1879, down to and including the year ending June 30, 1903. (Subdivision XXI, pages 41 to 74 inclusive, Stipulation as to the Facts.)

*Seventeenth:* Notice of the assignment and conveyance of these grants by the deed from the Oregon and California Railroad Company to the European & Oregon Land Company; the Oregon Central Railroad Company, East Side, to the Oregon and California Railroad Company by deed of date March 29, 1870; conveyance of the Oregon Central Railroad Company, West Side, to the Oregon and California Railroad Company by deed of date October 6, 1880, and the various mortgages from the beginning down to and including the mortgage of July 1, 1887, all of which were of record in conveyances of deeds and mortgages



in the office of the County Clerk or County Recorder of Conveyances in the various counties in Oregon in which the lands or any part thereof were situated, and all of which were filed with the Secretary of the Interior at or about the time they were executed, or were brought to the attention of the Department of the Interior by requests for re-conveyances and joinder therein by the various trustees under said mortgages, as shown by the evidence and exhibits in the case. This evidence also shows the acquiescence of the United States in the execution of all such instruments.

*Eighteenth:* Exhibit No. 257 Vol. XI 5789 Vol. XII p. 6449 Transcript) which shows conveyances made by the Oregon and California Railroad Company to various purchasers, from 1873 to January 16, 1907, and consideration therefor, showing that the company sold these lands, claiming to hold title in fee simple without particular regard to the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870, unless the same shall be construed to apply to actual settlers on these lands prior to issuance of patents and prior to the acceptance of the completed sections of the road.

## VI.

A CONDITION SUBSEQUENT MUST BE, NOT ONLY EXPRESS OR IMPLIED, BUT LEGAL, DEFINITE, AND CERTAIN, REASONABLY POSSIBLE OF PERFORMANCE, AND NOT REPUGNANT TO THE NATURE OF THE ESTATE TO WHICH IT IS ANNEXED. IN THE ABSENCE OF EXPRESS LIMITATION, A CONDITION SUBSEQUENT MUST BE CAPABLE OF PERFORMANCE WITHIN A REASONABLE TIME, AND CONTINUALLY AND REGULARLY KEPT THEREAFTER. IF, THEREFORE, WITHIN A REASONABLE TIME AFTER THE TITLE VESTED IN THE COMPANY, TO ANY PART OF THESE LANDS, IT COULD NOT SELL THESE LANDS TO "ACTUAL SETTLERS" FOR THE PRICE NAMED, IN THE QUANTITIES SPECIFIED, THE CONDITION BECAME IMPOSSIBLE OF PERFORMANCE, AND WAS THEREBY DISCHARGED. THE SAME RESULT WOULD FOLLOW WHERE PERFORMANCE OF THE CONDITION WAS RENDERED IMPOSSIBLE, OR ITS PERFORMANCE BY THE COMPANY MADE PRACTICALLY IMPOSSIBLE, BY LEGISLATION ENACTED BY THE UNITED STATES. THE PROOF SHOWS THAT THERE WAS AT NO TIME SINCE THE TITLE VESTED IN THE COMPANY, PRACTICAL ABILITY OR POSSIBILITY TO SELL THESE LANDS TO "ACTUAL SETTLERS" FOR THE PRICE NAMED, IN THE QUANTITIES SPECIFIED. THE CHARACTER OF THE GRANTED LANDS, THEIR SITUATION AND LOCATION, RENDERED THEM UNFIT FOR DISPOSITION UNDER THE SETTLEMENT LAWS IN ACCORDANCE WITH THE TERMS OF THE CONDITION. PROOF OF THESE FACTS TO THE SATISFACTION OF THE COURT BY THE VOLUMINOUS RECORD, IS COMPETENT AND CONVINCING, TO SHOW THAT EVEN THOUGH THE LANGUAGE USED SHALL BE CONSTRUED AS A CONDITION SUBSEQUENT, SUCH CONDITION WAS IMPOSSIBLE OF PERFORMANCE.

THE PROOF ALSO SHOWS THAT THE EVEN SECTIONS WITHIN THE LIMITS OF THE GRANTS WERE OF THE SAME CHARACTER, AND THAT THEY WERE UNFIT FOR DISPOSITION UNDER THE SETTLEMENT LAWS, IN EFFECT ON APRIL 10, 1869, AND ON MAY 4, 1870, AND IN RECOGNITION OF THIS, CONGRESS, ON JUNE 3, 1878, (20 Stat. 89) PASSED THE TIMBER AND STONE ACT, AND ON MARCH 3, 1891, (26 Stat. 1097) REPEALED THE PRE-EMPTION LAW OF 1841, AND ALL OTHER LAWS ALLOWING PRE-EMPTIONS OF THE PUBLIC LANDS, AND ON AUGUST 20, 1912, ENACTED THE SO-CALLED INNOCENT PURCHASER'S ACT, (37 Stat. 123) BASED UPON THE REPORT OF THE HOUSE COMMITTEE OF PUBLIC LANDS, TO THE EFFECT THAT THESE LANDS SOLD IN ALLEGED VIOLATION OF THE "ACTUAL SETTLERS" CLAUSE, WERE CHIEFLY VALUABLE FOR TIMBER, AND WERE NOT ADAPTED TO APPROPRIATION UNDER THE SETTLEMENT LAWS.

THE PROOF ALSO SHOWS THAT THE EVEN SECTIONS WITHIN THE LIMITS OF THESE GRANTS, HAVE BEEN MAINLY APPROPRIATED BY ENTRYMEN UNDER THE TIMBER AND STONE ACT, OR FRAUDULENT EVASION OF THE HOMESTEAD ACT, AND AS SOON AS TITLE HAD BEEN OBTAINED, THE ENTRYMEN CONVEYED THE LANDS TO TIMBER INVESTORS.

The testimony as to the timber character of this land, its soil and topography, conclusively shows that—

- (a) The unsold lands of any market value are chiefly valuable for timber.
- (b) The cost of clearing the land and preparing the same for cultivation is prohibitive.
- (c) That not exceeding fifty per cent. of the whole upon an average, even when cleared, could be



used for any agricultural purpose, and then chiefly for grazing in large areas, wholly inconsistent with the requirements and purposes of the settlement laws.

- (d) That the only demand for these lands for alleged settlement arose about 1907, after the Legislative Memorial, and that these so-called "settlers" have applied to purchase and pretended to settle upon these lands solely because of their timber value and with no bona fide intention to observe the spirit or even the letter of the settlement laws.
- (e) That the title to the even sections has mainly been acquired under the Timber and Stone Act or under fraudulent homestead or pre-emption entries, and immediately sold to timber speculators, manufacturers and investors, who now own the same.
- (f) That the lands involved in suit have been on the market since April 10, 1869, or shortly thereafter, as the construction of the road progressed, and that up to 1903 the only sales that had been or could have been made, were made in substantial compliance with the settler clause, and that only 163,430.28 acres were sold prior to May 12, 1887, and that the company was unable, after a period of more than 24 years, to sell these unsold lands to actual settlers for the reasons that, (1) there were no actual settlers who applied to purchase the same. (2) the lands were not suitable for or adapted to settlement, and (3) they were substantially without any value for any purpose.

If, therefore, these lands could not be sold to actual settlers upon the terms of the act for these substantial

reasons, the company, being entitled to apply the lands in aid of the construction of the road, and having exhausted its power to sell under the terms of the statute, must necessarily hold the lands indefinitely without power or ability to sell, or may sell without regard to the actual settler clause. Under such circumstances the condition, if it is so to be construed, was actually and legally impossible of performance and was discharged. Thereafter and thereupon the estate became absolute, freed from the condition.

Preliminary to a discussion of the facts as applicable to the legal questions involved, the status of the settlement laws at the time these grants were made and their status at this time, as well as the changed policy of the United States in respect to the disposition of this character of land, must be considered. The pre-emption law was in effect on July 25, 1866, and on May 4, 1870. This was repealed on the 3rd day of March, 1891, (26 Stat. 1097). The Homestead Act was passed May 20, 1862, (12 Stat. 392), and consists of Sections 2289, 2290, 2291, etc., Revised Statutes of the United States, 6 Fed. Stat. Ann., pages 285, 286, 287, 298. The Act of July 25, 1866, (14 Stat. 239) so amended the homestead law, as applicable to the even sections, within the limits of this grant, as to increase the price from \$1.25 per acre to \$2.50 per acre, and also provided that settlers under the provisions of the Homestead Act should be entitled, within the limits of the grant, to patent for an amount not exceeding 80 acres of the land within the even sections. It would seem from the provisions of Section 2 of the Act of July 25, 1866, (14

Stat. 239) that under the pre-emption law, a bona fide actual settler could acquire 160 acres of these lands in the even sections, by paying the double minimum price or by paying \$2.50 per acre, and otherwise complying with the pre-emption law, but that a homestead applicant, although paying \$2.50 per acre, could only secure 80 acres. The Homestead Act has been amended or enlarged or limited from time to time. On February 19, 1909, (35 Stat. 639) and on June 17, 1910, (36 Stat. 531) Congress passed acts providing for enlarged homesteads. On February 11, 1913, (Public No. 369) Congress passed an act amending Sections 3 and 4 of the acts of February 19, 1909, and June 17, 1910. Congress, on June 6, 1912, (37 Stat. 123) passed the so-called three-year homestead law. Circular No. 208, issued February 13, 1913, by the Secretary of the Interior, says:

“By the act of June 6, 1912, (37 Stat., 123) the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. The three-year period of residence, however, is fixed not from the date of the entry but ‘from the time of establishing actual permanent residence upon the land.’ It follows as a consequence that credit cannot be given for constructive residence for the period that may elapse between the date of the entry and that of establishing actual permanent residence upon the land.”



Upon the subject of cultivation the circular issued by the Secretary of the Interior, says:

"Prior to the passage of this act no specific amount of cultivation had been required respecting a homestead entry made under the general law; that is, an entry for 160 acres. With respect to every such entry section 2291 of the Revised Statutes had required proof of 'cultivating the same for the term of five years immediately succeeding the time of filing affidavit.' The words 'the same' could refer only to the entry, and literally construed would require the cultivation of the entire tract entered for the term of five years. But a more liberal interpretation has properly obtained in the Land Department, and proof has been accepted upon a showing that the tract has been used in a husbandlike manner, even though a smaller part of the entire entry has been actually cultivated than was in fact susceptible of cultivation. \* \* \* \* \* Under exceptional circumstances grazing land has been accepted as the equivalent of cultivation, where the lands were valuable only for grazing purposes. \* \* \* \* \* Where such lands are in fact physically and climatically susceptible of tillage, the cultivation provisions of the new homestead law must be applied. By that law it is required that the claimant 'cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth beginning with the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged homestead laws, double the area of cultivation herein provided shall be required, but the Secretary may, upon a satisfac-

tory showing, under rules and regulations prescribed by him, reduce the required area of cultivation.' ”

The enlarged Homestead Acts, (35 Stat. 336; 36 Stat. 531) authorize entries of 320 acres of lands designated for this purpose by the Secretary of the Interior, and require proof “that at least one-eighth of the area embraced in the entry was continuously cultivated to agricultural crops, other than native grasses, beginning with the second year of the entry, and at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.”

The Secretary of the Interior, in this circular, speaking of the character of cultivation required, says:

“In reducing the period of residence required in perfecting title to a tract of land entered under the homestead law from five to three years, Congress has required that it be shown that an actual cultivation has been accomplished of at least certain specified portions of the land entered. This amount has been fixed at one-sixteenth, beginning with the second year of the entry, and one-eighth the following year and until proof is offered. In view of the liberal reduction in the period of residence, making it possible to secure title in three years, which would require a showing of but two years’ cultivation of one-sixteenth of the area entered and an additional one-sixteenth for but one year, a mere breaking of the soil will not meet the terms of the statute, but such breaking or stirring

of the soil must also be accompanied by planting or the sowing of seed and tillage for a crop other than native grasses."

It would be practically impossible, under this construction of the homestead law, without a reduction of the area required to be cultivated, for any one to enter any portion of these unsold lands. It is in effect a legislative declaration that the provisions of the Homestead Act, as amended, shall not be deemed applicable to lands that are chiefly valuable for timber.

Circular No. 218, issued March 17, 1913, by the Department of the Interior, and addressed to the Registers and Receivers of the United States Land Offices, in various states, including the State of Oregon, refers to the Act of Congress approved February 11, 1913, amending Sections 3 and 4 of the Acts of February 19, 1909, (35 Stat. 369) and June 17, 1910, (36 Stat. 531) providing for enlarged homesteads. This act reduces to one-sixteenth of the area embraced in the entry, beginning with the second year of such entry, and one-eighth of the area, beginning with the third year, thus carrying into the enlarged homestead laws the reduction of cultivation effected by the three-year homestead law of June 6, 1912, (37 Stat. 123).

The Secretary of the Interior rules that a person who has made original entry under Section 2289 of the Revised Statutes,—that is, under the original Homestead Act—and has subsequently made an additional entry under Section 3 of the enlarged homestead acts, may make proof under certain conditions, as to cultivation.



The Act of February 11, 1913, being Public No. 369, requires that the entryman, under the act, shall, "in addition to the proofs and affidavits required under said section (2291) prove by two credible witnesses that at least one-sixteenth of the area embraced in such entry, was continuously cultivated for agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-eighth of the area embraced in the area was so continuously cultivated beginning with the third year of the entry."

The Act of June 6, 1912, (37 Stat. 123) amendatory of Sections 2291 and 2297 of the Revised Statutes, requires that the entryman, in order to comply with the requirements of cultivation, shall cultivate not less than one-sixteenth of his entry beginning with the second year, and not less than one-eighth beginning with the third year, except that in cases of entries under Section 6 of the enlarged homestead law, double the area of cultivation required by the Act of June 6, 1912, shall be required. The act expressly provides that the provision as to cultivation shall not apply to entries under the Act of April 28, 1904, commonly known as the "Kinkaid Act," or entries under the reclamation act of June 17, 1902.

It is thus apparent that Congress has so modified the Homestead Act as that, read in connection with the provisions of Section 27 of the Act of July 25, 1866, as to application of the Homestead Act limiting the applicant to 80 acres, the even sections within the limits of of this grant are practically withdrawn from entry

under the Homestead Act, thus recognizing, as we claim, the non-settlement character of the odd sections involved in this suit, and thus characterizing and defining the character of actual settlers to whom the company was required to sell under the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870.

It should also be borne in mind that Congress, on June 3, 1878, (20 Stat. 89) in recognition of the non-settlement character of lands that are chiefly valuable for timber and stone, passed an act commonly known as the "Timber and Stone Act." This act is applicable to and provides for the sale of timber lands in the States of California, Oregon, Nevada and Washington, and in so far as it applied to the even sections within the limits of the grant of July 25, 1866, or May 4, 1870, was a modification of the contract under which the even sections within the limits of these grants were to be disposed of by the United States under the homestead and pre-emption law. The proof shows that a considerable percentage of the even sections of lands owned by the United States within the limits of these grants has been disposed of under the Timber and Stone Act and has passed into the hands of timber owners. The Timber and Stone Act provided for the sale of lands chiefly valuable for timber or stone but unfit for cultivation, and that they could be sold in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of \$2.50 per acre. No settlement was required, and the lands could be entered by persons other than an indi-

vidual settler. An association of persons could acquire these lands, and presumably a corporation composed of an associaton of persons would be a qualified purchaser.

The Act of June 3, 1878, was, by the Act of August 4, 1892, (27 Stat. 348) amended so as to be made applicable to all the "public land states," this indicating a marked and definite policy of the United States as to lands of the character known as timberlands, chiefly valuable for timber, or lands chiefly valuable for stone, and was particularly applicable to lands of the kind involved in this suit, which, as the proof will show, are chiefly valuable for timber and are unfit for and not adapted to settlement.

The actual settler clause of the Act of April 10, 1869, (16 Stat. 47) contemplated that, if the proviso is reasonably clear, definite and certain so as to be enforceable, and if the same is effective, the company should sell these lands "to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre." The term "actual settler" must be held to refer to the same class of persons and to require the same class of persons and to require the same character of settlement as contemplated by the settlement laws then in effect, namely, the Homestead Act, which, at that time, required a five-year residence, settlement and cultivation, unless commuted, and the Pre-emption Act, which required a fixed time of residence, settlement and cultivation.



The status of such actual settler, in respect to standing timber, under the Homestead Act as it existed at the time the case was decided, has been settled by the decisions of the Supreme Court of the United States.

In *Shiver v. United States*, 159 U. S. 491, 497, Mr. Justice Brewer, speaking for the court, says:

“The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Rev. Stat. Sec. 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it.

“With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said, by Washburn in his work upon Real Property, (1st ed.) vol. I, p. 108: ‘In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.’

“ ‘Questions of this kind have frequently arisen

in those States where the lands are new and covered with forests, and where they cannot be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. . . . Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he cannot cut the wood for purposes of sale; it is a waste if he does.'

"By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth \$100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation."

In *Stone v. United States*, 167 U. S. 178, 193, the court quotes with approval the charge of the jury given by Judge Hanford in the court below, and speaking of this, Mr. Justice Harlan says:

“The court proceeded in its charge: ‘A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plough shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the pre-emption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has



perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation. As between the Government and the settler, the title to the land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful.'

"It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applicable to the matters referred to by the trial court. They are in accord with the views of this court as expressed in *Shiver v. United States*, 159 U. S. 491, 497, 498. See also *United States v. Cook*, 19 Wall. 591."

In *United States v. Ball*, 31 Fed. 667, 668, Judge Deady says:

“A settler on the public lands, under the homestead act, must reside on and cultivate the same for five consecutive years before he is entitled to a certificate. Section 2291, Rev. St. In the meantime, the legal title to the land, and the timber thereon, is in the United States, and the occupant is not entitled to cut or remove any timber therefrom, except as allowed by Section 4 of the act of June 3, 1878, (20 St. 90) which provides, in effect, that an ‘agriculturist’ on the public land—a homesteader or pre-emptioner—shall not cut or remove timber therefrom except in the ordinary preparation of his ‘farm for tillage;’ the manifest meaning of which is that the timber shall not be cut for the sale of the timber, but for the improvement of the land. And this implies that the cutting and tillage shall not be far apart; that the plow must follow the axe. *U. S. v. Williams*, 9 Sawy. 377, 18 Fed. Rep. 473.”

In that case there was some pretense in the pleadings that the timber was cut for the purpose of clearing the land for cultivation. Speaking of this Judge Deady says:

“There is an allegation tagged on to this defense, to the effect that this timber was cut for the purpose of clearing the land for ‘agriculture,’ to which no attention has been paid.”

Of course, the pretense that the timber was cut for that purpose was a pretense, as it must be in every case where lands are chiefly valuable for timber, and

were chiefly valuable for timber at the time of the timber entry.

In *United States v. Murphy*, 32 Fed. 376, 379, Judge Jackson, afterwards a Justice of the Supreme Court of the United States, says:

“While in the occupation of the premises with the ‘bona fide’ intention of completing his homestead, it is held that the homesteader may clear any portion of the land for the purpose of cultivation and settlement. In making clearing for these objects he may cut and remove the timber, and such portions of the timber so cut and removed from the clearings intended for cultivation or tillage as may be needed on the place for the improvements thereon he may sell; but not further or otherwise. He may also use the timber in the erection of buildings necessary for the convenient occupation of the land, and its improvement, that is to say, better adapting it to convenient occupation. The timber may also be used for necessary and proper fencing and repairs. In other words, the homesteader may use or dispose of timber as an incident to his settlement, cultivation, and improvement of the land. He has only those rights in or over the property which are necessary to the perfecting of his title. His title can only be perfected by settling upon and improving the land for cultivation. For these purposes he may exercise ownership over the timber, but he is not allowed to sever the timber from the land for the purpose of sale and traffic. As held in the *Timber Cases*, 11 Fed. Rep 81, ‘a settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the land, and destroy the



value of the public domain, even though he intends to acquire the title under his claim.' The authorities, which need not be commented on in detail, fully sustain and support this statement of the law, and the proposition above stated. *U. S. v. Cook*, 19 Wall. 591; *U. S. v. McEntee*, 23 Int. Rev. Rec. 368; *The Timber Cases*, 11 Fed. Rep. 81; *U. S. v. Stores*, 14 Fed. Rep. 824; *U. S. v. Williams*, 18 Fed. Rep. 478; *U. S. v. Lane*, 19 Fed. Rep. 910; *Bly v. U. S.*, 4 Dill. 465; and *U. S. v. Smith*, (*U. S. Dist. Court Ark.*, April Term, 1882).

In *Stone v. United States*, 64 Fed. 667, 676, The Circuit Court of Appeals, Ninth Circuit, speaking by Judge Hawley, after quoting the lucid charge of Judge Hanford in the court below, says:

"This portion of the charge must be considered in the light of the fact that the court had, at great length, correctly charged the jury as to the rights of the bona fide settlers upon the public lands, and that, under the peculiar facts of this case, it became the duty of the court to charge the jury as to the limitations and exceptions to certain general rules he had enunciated, and to submit to the jury the question whether the persons from whom defendant had purchased the timber were actual settlers in good faith, and whether they had, under the pre-emption or homestead laws, acquired any right to the lands. The testimony was to the effect that the settlements had been made upon lands that were not well adapted for cultivation; that the improvements which had been made were very slight, consisting only of small cabins; that there was no such clearing of the land as to indicate that the timber had been cut and removed for the

purpose of cultivating the soil; that the cutting of the timber had been done indiscriminately all over the claim; that the limbs and brush and tops of the trees had been left upon the ground; that the parties who had filed their declarations of settlement, after cutting and selling the timber off the land, had departed therefrom, etc. It is conceded by the defendant that all the testimony which tended to establish fraud and bad faith of these settlers was admissible in evidence. It would have been error to exclude any testimony which tended to establish such facts. *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504, and authorities there cited. The charge of the court, under consideration, was applicable to the facts of the case, and, in our opinion, correctly stated the principles of law that applied to such facts. *U. S. v. Cook*, 19 Wall. 591; *U. S. v. Williams*, 18 Fed. 475; *U. S. v. Ball*, 31 Fed. 668."

This case was affirmed by the Supreme Court of the United States in *Stone v. United States*, 167 U. S. 178, 193, *supra*.

In *United States v. Niemeyer*, 94 Fed. 147, 150, Judge Williams, charging the jury, says:

"The congress of the United States, as I have told you, after that passed the homestead laws, which permit and encourage every citizen of the United States, or any one who has declared his intention to become a citizen, who in good faith—and that is always an important part of it—who in good faith intends to make a home for himself and his family, to go upon any 160 acres of vacant lands belonging to the government, and live upon

it, cultivate it, and after he has lived upon it continuously for five years, he may have a patent to it, which gives him the land in fee simple. The congress of the United States, or the government of the United States, as I may say, having passed a law of this kind giving to the citizen the land, certainly has a right to prescribe how he shall occupy it until his five years of continuous residence has given him the title. It has by law and by the decisions of the highest courts prescribed rules and regulations to govern his conduct while in this occupancy for the five years. Upon going upon the land after getting his proper papers from the local land officers, he may use timber growing upon the land for the purpose of building a house upon it, and outhouses that are necessary. He may use timber for making rails to fence in the land, in order to put it into cultivation, and he may use enough for his firewood. The law goes further than that in its munificence, according to the decisions of the courts of the United States, and says that where the man in good faith has taken up a homestead, and is in good faith clearing up a part of it to put it into immediate cultivation, if there is more timber upon that piece of ground than has been necessary for the building of his house, his outhouses, his fences, and his firewood, the law does not say that he must burn it, but he may sell it; not off of the entire tract of land, but from that piece of land that he is going to put into immediate cultivation. It is immediate cultivation, not two years or three years thence, but immediate cultivation; the Supreme Court using a very apt phrase by saying, 'Upon the ground where the plow is to follow the axe.' Not only may he sell the timber from that piece of ground,



but he may exchange it for lumber; that is, the timber from the piece of ground he is putting into cultivation. \* \* \* \* I said to you before that congress passed this law having in consideration the customs and conditions of the men who had taken up pre-emption claims upon the vacant lands of the United States. It did not contemplate and this law does not authorize, a man to take up a homestead, and sit down upon it, and do nothing, sell the timber off of it, hire men to put up a house, hire men to make the rails, hire men to cut the firewood that he burns, hire men to do everything that is done about the place, and pay for it with the timber on the place. The homesteader is expected to do something himself. The government gives him the timber to build his house, make his rails, and to keep himself comfortable in cold weather by the firewood that he cuts himself, or that he does himself; not that he hires this one and that one to do by giving them other timber from the lands to pay for these things being done.\* \* \*

“The court calls your attention again to the question of the land being put in cultivation. Cultivation means cultivation. Making a stock farm or stock range of land is not putting in into cultivation. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in cultivation. That is not what the law contemplates when it says cultivation. It means plowing and preparing it for crops, or the raising of something that grows from the ground, besides grass.”

It will thus be seen that the court emphasizes cultivation and declares that making a stock farm or stock

range of land is not putting it into cultivation. That preparing it for grazing purposes is likewise not cultivation.

The amended homestead acts of February 11, 1913, (Public No. 369) and of February 19, 1909, (35 Stat. 639) and June 17, 1910, (36 Stat. 523) and June 6, 1912, (33 Stat. 123) all embrace the character and extent of cultivation, indicating a settled legislative policy as evidenced by the continuous sales of these lands under the Timber and Stone Act of June 3, 1878, and the Forest Reserve policy that the United States does not consider that these lands, of the character involved in this suit, are adapted to entry under the settlement law.

Judicial construction of these various statutes make it practically impossible for such land to be entered under the homestead act, and in fact, the courts hold that lands that are chiefly valuable for timber and entered as such by a homestead entryman, are not subject to entry under the settlement laws. The policy of the Land Department is in harmony with these decisions and with this trend of legislation. It may well be claimed that these various statutes indicate a change of legislative policy and amount to a waiver by operation of law of the claim that the companies are obligated or bound to sell these lands under the limitation and restrictions of the actual settler clauses of the Act of April 10, 1869, and the Act of May 4, 1870. It is fundamental that where a condition becomes impossible of performance, or such performance is excused by law,

that the condition is discharged. It is also elementary that if the condition is impossible of performance in fact to the knowledge of both parties to the grant or deed, and this impossibility of performance in fact is acquiesced in and other methods of sale of lands are adopted, that this impossibility or performance in fact will be assumed and the condition discharged, or if not assumed, the condition will be discharged because of impossibility of performance.

As further bearing upon the requirements of the settlement laws, attention is called to the case of *Conway v. United States*, 95 Fed. 615, 617, where Judge Adams, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

“It is a well-settled construction of the homestead statute that while a settler acquires no title to the lands entered by him until the issue of the patent, at the expiration of five years after the entry, he has nevertheless a right during these five years to treat the lands as his own, in a certain qualified sense,—to the extent, at least, of performing those acts which are required under the law to entitle him to a patent therefor. He must reside and continue to reside upon the lands entered, and cultivate and continue to cultivate the same for a period of five years. To perform these conditions necessary to the acquisition of title, he clearly has the right to utilize the timber growing upon the land for the purpose of building himself a house to live in, and such outhouses and fences as may be reasonably necessary for his initial and progressive farming operations. He



may also, and must, in the performance of the condition of cultivation, first prepare the land therefor. If there be growing trees or dead timber, which are impediments to successful husbandry, he may clearly remove the same, or cause them to be removed, so far as the legitimate purpose of cultivation reasonably warrants; and he may, subject to such limitations, sell the same, and appropriate the money realized therefrom. While a settler may avail himself of these necessary privileges, he must at all times act in good faith in the exercise of them. He cannot invoke or pretend to exercise them as a cover to despoil the lands of their timber, or to make profit out of them, without regard to the legitimate purpose of building him a home, outbuildings, and fences, and fitting the soil for cultivation and use. *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54; *The Timber Cases*, 11 Fed. 81; *U. S. v. Yoder*, 18 Fed. 372; *U. S. v. Lane*, 19 Fed. 910; *U. S. v. Ball*, 31 Fed. 667; *U. S. v. Murphy*, 32 Fed. 376; *U. S. v. Nelson*, 5 Sawy. 68, Fed. Cas. No. 15,864. In the case of *Shiver v. U. S.*, supra, the supreme court remarks as follows:

“ ‘With respect to the standing timber, his (the settler’s) privileges are analogous to those of a tenant for life or years.’

“Quoting from Washburn, in his work on Real Property, the court, referring to lands which are new and covered with forests, and which cannot be cultivated until cleared of the timber, continues as follows:

“ ‘In such case it seems to be lawful for the tenant to clear the land, if it would be in conformity with good husbandry to do so; the question depending upon the custom of farmers, the situa-

tion of the country, and the value of the timber.  
 \* \* \* By analogy, we think that the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. \* \* \* A reasonable construction of the statute,—a construction consonant both with the protection of the property of the government in the land and of the rights of the settler,—we think, restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber, and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation.’ ”

In *United States v. Budd, et al.*, 43 Fed. 630, Judge Hanford, construing the Timber and Stone Act, and the character of lands involved in that case, says:

“Most of the testimony introduced on the part of the government was directed to support the second proposition,—that is, as to the character of the land, whether it is in fact unfit for cultivation, and chiefly valuable for timber; and the efforts of counsel in the argument were mainly directed towards this branch of the case. In the argument it has been contended that a proper interpretation of the statute would exclude from entry and sale, under its provisions, all lands capable of being improved or redeemed from their natural unfitness for cultivation, and rendered capable of yielding crops of vegetation, grain, and fruit, and which

have any element of value other than timber or stone; in other words, the court is asked to judicially determine that congress, by the use of the words 'valuable chiefly for timber, but unfit for cultivation,' in the first section of the act, and the words 'unfit for cultivation, and valuable chiefly for its timber or stone,' in the second section, failed to express the meaning intended, and that the reading of the act to express its true intent and meaning requires the rejection of those words, and the substitution in their place of such words as the following: 'Unfit and incapable of being made fit for cultivation, and of no value except for timber or stone.' In support of this contention, the opinion of Mr. Secretary Teller, in the case of *Spithill v. Gowen*, 2 Dec. Dep. Int. 631, has been cited, in which he says:

" 'This act contemplates such timber lands as are found in broken, rugged, or mountainous regions, where the soil, when the timber is cleared off, is unfit for cultivation, and not lands, though heavily timbered, where the soil is susceptible for cultivation.'

"The act in terms makes no reference to broken, rugged, or mountainous regions, and does not allude to the condition of the soil, after the removal of the timber; and I am not aware of any rule or reason requiring the court so to construe the statute as to enlarge the limitations which it imposes, or narrow its application so as to exclude all lands in the states and territories named, except the inaccessible portions in the broken and mountainous regions. For the production of valuable timber, strength and fertility of the soil, and conditions favorable for the growth of vegetation, are necessary, and there are no timber lands in this



state which will not, after the removal of the timber, yield crops of vegetation, grains, and fruit, and there are no broken, rugged, or mountainous regions unfit for cultivation where valuable timber can be found; and to give the statute the construction contended for makes it a self-contradiction, and impracticable, and thereby nullifies it. It is plain, also, upon the face of the statute that congress intended that it should be understood according to the ordinary meaning of the words and phrases used. The introductory words in the first section are 'that surveyed public lands of the United States \* \* \* may be sold. \* \* \*'

This language of the statute itself carries a direct contradiction of the assertion made in the opinion of Mr. Secretary Teller, above cited, that the act contemplates such timber lands as are found in broken, rugged, or mountainous regions. The act was made to go into immediate effect upon its passage, and by its terms it embraces and authorizes the sale of surveyed lands, which are not to be found in broken, rugged, or mountainous regions; for it is a matter of history in this country that settlements and improvements usually precede the surveys, and it is a matter of continual complaint that the government fails to extend its surveys as rapidly as the agricultural, lumbering, and mining industrial enterprises of the country demand, and it is a matter of common knowledge that the remote and more inaccessible regions, where the land is unfit for cultivation, have not been surveyed, and no provision for the survey thereof appears to have been contemplated. To fairly interpret this statute, the general descriptive features of the country to which it applies must be taken into account. In each of the states

named there is a diversity of climate, soils, timber, and natural formations. This is especially true of Washington, which may be taken as a representative of all, for the purpose of a more minute and particular description. Within this state are mountains, plains, hills, valleys, rivers, lakes, seas, forests, prairies, and mines of coal, iron, and almost every kind of minerals. It is divided by the Cascade range of mountains, running north and south across its entire breadth. East of the mountains the country is generally timberless, and the land is good, and easily brought under cultivation. However, it is not all of this description. There are in this part of the state small areas of timber in good quality, and the land is of inferior quality for agricultural purposes, though not barren. These timbered tracts answer the description in the statute, of lands, unfit for cultivation, and chiefly valuable for timber, and they are within the limits of the public surveys, made and being made as rapidly as appropriations can be obtained for the purpose. All of the state west of the mountains is a timbered region, though there are a few small prairies. The river bottoms and valley lands, having a rich alluvial soil, is considered good farming land, although in its natural state it is covered by a dense growth of alder, ash, cottonwood, and maple timber, which is useful and valuable for fuel and many other purposes. The stumps and roots of this timber soon decay after the trees are cut down, and in two or three years' time they can be easily and cheaply removed and the land then yields bountiful crops of vegetables, grass, hops, grain and fruits. Fortunes have been made out of the produce of comparatively small farms of this quality

of land by men who, without capital, took the land in the rough, and by their own hands improved and cultivated it. This class of land, although valuable for timber, is not chiefly so, and is not unfit for cultivation, because it can be profitably cleared, improved and cultivated. The most valuable timber, however, grows upon hilly and stony land. Fir and cedar stumps and roots will remain many years without decaying, and cannot be got rid of without much labor or great expense; and the soil of such timber lands is not so rich, and will not yield so abundantly, as that which I have previously described, yet will, when cultivated, produce the same kind of crops. After removal of the valuable timber, and while stumps remain, it is readily convertible into pastures, but is unfit for cultivation, because it cannot be at once made tillable without an expense greater than its value for agricultural purposes. Such land is chiefly valuable for its timber, and vast areas of it are to be found within the limits of the surveys. It is the character of land contemplated by this statute, and is as much subject to sale under its provision, if situated in near proximity to navigable water, or a farming community, or to a city, or a railroad, as if it were in some remote, broken, rugged, and mountainous region. To a person acquainted with this country, this class of land is as readily distinguished from the alderbottom and valley lands, which are considered valuable for cultivation, as a forest is distinguished from a prairie.

“The evidence before me leaves no uncertainty or doubt as to which class the tract conveyed by the patent to Budd belongs. On the part of the government, eight witnesses have testified, proving that the land can be cultivated after the re-



moval of the timber and stumps; that it is similar to other lands in the immediate vicinity, occupied by settlers, who each cultivate small tracts thereof; that in their opinion the land is valuable for agricultural purposes; and that the land is covered with a crust of leaf mould, which is an excellent fertilizer. And to confirm this testimony samples of the soil and specimens of the grain and grass grown by the settlers have been introduced. These witnesses show by their evidence that the tract, except about 15 acres, is timbered, and show nothing as to the value of the timber, except that there has not been any market or demand for it. This evidence is insufficient to warrant the cancellation of a patent. But the defendants have not been content to accept a Scotch verdict. They have met the issue with evidence of the most conclusive character. Thirteen witnesses were called, who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall, and straight and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre,—and this testimony and estimate is not controverted. The field notes made by the Government surveyor at the time of surveying the land, more than 25 years ago, describe the land as being stony and second rate, and the timber as fir, cedar, and hemlock, and the most convincing testimony of all is a series of 12 photographs, taken near the centers of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees, standing so near together as to force each other to grow straight and tall. They satisfy the court that this

tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it."

This case was affirmed by the Supreme Court of the United States in *United States v. Budd*, 144 U. S. 154, 166, where Mr. Justice Brewer, speaking for the court, says:

"With regard to the second question: The description in the act is of lands 'valuable chiefly for timber, but unfit for cultivation.' It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation and therefore not within the description of lands purchasable under this act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:

" 'Thirteen witnesses were called who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate are not controverted. The field notes made by the government surveyor at the time of surveying the land, more than twenty-five years ago, describe the land as being stony and second rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve

photographs taken near the centres of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it.'

"If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be but what is. Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must



be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

See also *Whitney v. Spratt*, 25 Washington 62, affirmed by the Supreme Court of the United States in *Thayer v. Spratt*, 189 U. S. 346.

The rules of the Land Department were not originally in harmony with the views thus expressed.

In *Hughes v. Tipton*, Second Land Decisions, 334, it was held that the Act of June 3, 1878, did not contemplate entries exclusively on land which is wholly unfit for cultivation after the timber has been removed but upon land which is unfit for ordinary agricultural purposes, following *Spithill v. Gowen*, 10 Land Owner 73, where it was held that the act contemplated the sale, as timber land, of such tracts only as had "soil unfit for ordinary agricultural purposes when cleared of timber."

In *Rowland v. Clemmens*, Second Land Decisions, 633, Secretary Teller, in a case on appeal from the local land office at Vancouver, Washington, held that notwithstanding there might be much valuable timber on a tract, the same was not subject to entry under the Act of June 3, 1878, if the soil was susceptible of ordinary cultivation, except in minor portions where it was rocky or steep.

This rule was followed in *Ellis v. Moore*, 6 Land Decisions, 630, adhering to the rule of *Hughes v. Tip-*

ton, 2 Land Decisions, 336, except that in the case last cited Secretary Vilas found upon the principle announced in the previous departmental decisions, that the land in question was chiefly valuable for timber and unfit for cultivation. The homestead entry in that case was cancelled, in so far as the same conflicted with the timber application under the Timber and Stone Act of June 3, 1878. These lands were situated in the Sacramento Land District, in the State of California.

In *Wright v. Larson*, 7 Land Decisions 555, Secretary Vilas says:

“On the hearing, the appellant offered to prove, that the land in dispute was ‘chiefly valuable for timber’ and ‘unfit for cultivation.’ The local officers refused to allow this proof to be made, and this is one of the errors assigned on this appeal. This assignment of error must be sustained. In the case of *Porter v. Throop* (6 L. D. 691) I held, that ‘while the act of June 3, 1878, in exempting from its operation lands claimed by a ‘bona fide settler,’ ex vi termini, recognizes that there may be a bona fide settlement on the lands of the character described therein—that is, lands chiefly valuable for timber and ‘unfit for ordinary agricultural purposes’—yet, for obvious reasons, such settlements should be closely scrutinized, and the fact, that the land is of such a character, might be a circumstance, taken in connection with the other facts of the case, shedding light upon the question of the bona fides of the settler.’ The exception in the act of June 3, 1878, is in favor of the bona fide settler,’ and the issue involved in

this case is the bona fides of the settlement of Larson. The evidence offered as to the character of the land being relevant to this issue, under the circumstances of this case hereinafter stated, should have been admitted.

“It is true, as stated in your office decision, that ‘The question of Larson’s compliance with the requirements of the pre-emption law will be inquired into when he offers to make proof,’ and it was not necessary, as between him and the timber land applicant, that the compliance with those requirements should have been shown on the hearing in this case. The bona fides of his settlement and not his conformity to the requirements of the law, was the subject of inquiry, and on this issue the burden was upon the timber land applicant. A settlement to be a bona fide must be made for the purpose of making the tract a home. (*Porter v. Throop*, *supra*.) This is the test, and a settlement for the purpose of securing the timber on the land or for any other purpose than establishing a home, is not a bona fide settlement within the meaning of the act of June 3, 1878.

“It appears from the evidence, that the tract in dispute was six or seven miles from any other settlement in the dense forest of fir timber, and accessible only by a foot path, that it had been returned by the surveyor general as timber land, and had on it (according to the estimate of the witness) 4,000,000 feet of merchantable timber; and, while the local officers decided, as above stated, that evidence that the land was unfit for cultivation was not admissible, it appeared from the testimony incidentally, that the soil was poor broken and gravelly, and that it would require the expenditure of an amount wholly disproportionate



to any possible returns which could be expected from such land to clear and prepare it for cultivation. There seems to have been no inducement for a reasonable man of family to establish a home on such land, surrounded as it was by a forest, located so far from any other settlement and comparatively inaccessible. \* \* \* \* The character of Larson's improvements and of the land, its location and surroundings, and the large quantity of merchantable timber thereon (for utilizing which, together with that on other lands in the vicinity, a railroad had been projected and commenced about the time of Larson's filing), his maintenance of a home elsewhere after his alleged settlement on the land, and all the facts and circumstances of the case, convince me, that his was not a bona fide settlement for the purpose of establishing a home on the land, but that it was a pretended, or, at most, colorable, settlement, made with a view to securing the benefit of the timber thereon."

In re John A. McKay, 8 Land Decisions 526, Assistant Secretary Muldrow says:

"As this land is said to be densely covered with redwood and chiefly valuable therefor, all the facts and circumstances connected with Marsh's settlement and residence should be most carefully scrutinized so that it may be determined whether he was in fact a bona fide settler who made the land his home or whether his settlement was a pretended, or at a most a colorable settlement made with the view of securing the timber thereon. Porter v. Throop (6 L. D. 691; Wright v. Larson (7 L. D. 555))."

In re Daniel R. McIntosh, 8 Land Decisions 641, Assistant Secretary Chandler says:

“Land valuable for timber growing thereon may be acquired under the pre-emption law but the final proof should clearly show that it was taken in good faith for a home and not for the value of the timber alone.”

This decision was announced June 21, 1889, before the repeal of the pre-emption law on the 3rd day of March, 1891.

In State of California v. Sevoy, 9 Land Decisions, 139, Secretary Noble says:

“The remaining question to be determined is whether the land is of the character subject to pre-emption, and whether Sevoy has complied with the pre-emption laws as to inhabitancy, cultivation and improvement of the tract in controversy.

“The evidence shows that a greater part of the land is covered with heavy redwood timber, but it is also shown that part of the land is rich bottom land valuable for agricultural purposes, and that part of it has been cultivated by claimant. It is also shown that while the greater part of the land is chiefly valuable for its timber, yet it could be cleared so as to make the land valuable for pasturage. But although the land may be chiefly valuable for timber it will not defeat the right of a bona fide pre-emptor to take it under the settlement laws, if the bona fides of the pre-emptor are clearly shown Porter v. Throop (6 L. D. 691); Wright v. Larson (7 L. D. 555).

This was, of course, ruled when the pre-emption law was still in effect and before the modification of the homestead act, as we have shown.

In *re* George H. Hegeman, 11 Land Decisions 7, Assistant Secretary Chandler says:

“The record shows the tract involved to be chiefly valuable for timber. This being so, the good faith of the claimant should be clearly shown before he can be allowed to acquire the same under the pre-emption law. *Daniel R. McIntosh* (8 L. D. 641); *State of California v. Sevoy* (9 L. D. 139).

“That the claimant’s good faith is not clearly shown is, I think, manifest. His proof showing meager improvements was made within about the briefest permissible period following the initiation of his claim, and when considered with the surrounding circumstances, in the light of which his good faith must be determined, fails to satisfactorily show that he went on the land for the purpose of rendering a bona fide compliance with the pre-emption law.”

In *United States v. Montgomery et al.*, 12 Land Decisions 503, Acting Secretary Chandler, in ruling upon the claims afterwards considered in *United States v. Budd*, 43 Fed. 630, affirmed in 144 U. S. 154, says:

“The decision of the Department was that the lands in question were not subject to entry under the timber and stone act. Said act provides that lands ‘valuable chiefly for timber, but unfit for cultivation’ may be entered, etc. As has been said ‘all timbered lands are unfit for cultivation in their



natural condition' being thus unfit for cultivation by reason of the timber thereon, the logical result of the contention by the defendants would be, that the Department could not inquire into the character of the land, whether it was actually fit for agricultural purposes and cultivation or not, provided there was a sufficient number of trees on the tract to prevent, or render it unfit for cultivation, at the date of entry. Such a construction of the act cannot be entertained, as it would be a plain violation of its intention and spirit, as well as of its words.

"Two conditions must combine to make timbered land subject to purchase under said act.

"1st. It must be valuable chiefly for its timber;

"2nd. And unfit for cultivation.

"The absence of either of these conditions, excepts the tract from purchase. Then it becomes the imperative duty of the Department, in each case, to ascertain whether the tract with the timber removed, is 'unfit for cultivation.' If it is not, then the entry cannot stand.

"It was the evident intent, as gathered by this act, not to allow land fit for agricultural use to be purchased under this act. It is only such rough, stony or mountainous tracts as are unfit for cultivation on that account, that may be so purchased. The act does not read and cannot in reason be construed as meaning unfit for cultivation, on account of timber growing thereon. Some of the most fertile of the public lands are timbered, and when cleared are the most valuable for cultivation. The fact that Congress connected timber lands with stone, is a sufficient expression of the intent to allow only such lands as cannot be culti-

vated by ordinary methods of agriculture, to pass under this act."

In *Ward v. Montgomery*, 15 Land Decisions 280, the Department of the Interior modified its former ruling to conform to the ruling of the court in *United States v. Budd*, 43 Fed. 630, affirmed 144 U. S. 154. The Acting Secretary quotes at length from the opinion of Mr. Justice Brewer, and holds that while the evidence was conflicting as to the character of the land, but tested by the rule laid down by the court, found that there was no question but that the land was "unfit for cultivation" at the date of sale. To the same effect is *Kelly v. Ogan*, 15 Land Decisions 564. In the case last cited, Assistant Secretary Chandler says:

"It is practically admitted that this land is rough and mountainous, badly cut up with canyons, and sparsely, at least, covered with a low grade of timber, also stone. While the testimony is very conflicting as to the value of this tract for its timber product, yet, it is clear to my mind that is not very well adapted to agricultural purposes. The contestant offered testimony tending to show that twenty acres or upwards, of the tract might be, upon the removal of the timber and stone, used for the growing of oranges, vines, etc.; that the trees growing on the tract were of a scrubby character, of low order and fit only for firewood; that there were probably eighty to one hundred cords of wood which could be cut from trees growing along the ravines but would bring no profit if hauled to market. That it would cost \$700 to \$1,000 to construct a road to the tract. No evidence is offered for the purpose of showing what

it would cost to reduce this land to a condition fit for agriculture by removing the stone and timber, but all the testimony goes to show that without the removal of the trees and stone, the tract is unfit for cultivation.

“The entryman in support of his application, offers testimony for the purpose of showing that there are at least five hundred to one thousand cords of wood upon this tract; that it will cost \$2.75 per cord to cut it, and from \$3.50 to \$6.00 a cord to haul it to market where he could realize therefor, \$9.00 per cord; that on account of the stone and timber which are growing upon the tract and the canyons which cut it badly, it is unfit for cultivation, hence, the tract is chiefly valuable for its timber. The register and receiver adopted this view, as I think you did from a discussion of the case, independent of the question of where the burden of proof rested, and I am satisfied from the examination which I have given the case, that this tract is illy adapted for farming or agricultural purposes, and that, at the time this entry was made, the tract was chiefly valuable for its timber, and unfit for cultivation within the ruling of the supreme court in the case of *United States v. Budd*, 144 U. S. 154.”

In *Merritt v. Philp*, 16 Land Decisions 404, Assistant Secretary Chandler says:

“The first question to be considered relates to the character of this land. Is it, in the language of the act of June 3, 1878, ‘valuable chiefly for timber, but unfit for cultivation?’ This provision has recently been construed by the supreme court in the case of *United States v. Budd*, (144 U. S. .



154, 167), in which the rule is laid down that—  
 ‘The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.’ Judged by this rule, the land must be considered ‘valuable chiefly for timber, but unfit for cultivation,’ within the meaning of those terms as used in said act.

“The land is situated at an altitude of over 5000 feet, is rocky and of granite formation. The soil is shallow and poor, and cannot be irrigated on account of its altitude. The attempts made to raise crops thereon have all failed. The season for raising crops is short. In the winter the ground is covered with deep snow. The tract is heavily timbered with pine, fir, and cedar trees, and was variously estimated to be worth from \$2,000 to \$4,000 for its timber. There has lately grown up a greater demand for timber than formerly, and a lumber mill has been erected within a quarter or half a mile of said tract, and a greater amount of lumbering is carried on now than a few years ago.”

In *Robert v. Brownell*, 18 Land Decisions 216, on review of the decision of the register and receiver of the Olympia Land District of Washington, Secretary Smith says:

“In the opinion appealed from, I find a lengthy statement as to the comparative value of the land for timber and for agricultural purposes, is cleared, but under the facts in this case, as shown by the record, such comparative values are not material. Under the record it appears that the value of said land for agriculture in its primitive state, was nominal.

“In the case of *United States v. Budd* (144 U. S. 154), it was held (syllabus) that:

“ ‘Public lands . . . . valuable chiefly for timber, but unfit for cultivation, within the meaning of the timber and stone act of June 3, 1878, (20 Stat. 89, C. 151) include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands.’

“This rule has been followed by the Department in analogous cases since the promulgation of the supreme court decision above cited. See *Kelly v. Ogan* (15 L. D. 564), and *Gilmore v. Simpson*, (16 L. D. 546), although prior to that time an opposite ruling obtained in departmental adjudications.

“It appearing from the evidence, therefore that the land in question at the date of the filing of appellee’s timber land statement, was chiefly valuable for timber, it is held that the land was subject to entry under the act cited.”

In *Gibson v. Smith*, 18 Land Decisions 249, Secretary Smith, after reviewing the facts, says:

“The act intended to cover those lands upon which the timber growing, at the time of the sale, was so dense and of such character as to make the timber valuable in the way of lumber and for commercial purposes. The facts in this case show that the trees growing upon the tract were valuable chiefly as wood to be used as fuel and not as beams or lumber, for the use of commerce.”

See also *Gosling v. Murphy*, 18 Land Decisions 306, 308.

In *United States v. Searles et al.*, 19 Land Decisions, 258, Secretary Smith ruled that it is immaterial that

the land, if cleared of timber, would be fit for cultivation. If the land in its present state is chiefly valuable for timber, it does not matter that if the lands are cleared of the timber at heavy expense, they may be susceptible of cultivation or fit for cultivation. That circumstance does not bring the land within the class of lands adapted to entry under the settlement laws.

In *Jones v. Aztec Land and Cattle Company*, 34 Land Decisions, 115, 116, Acting Secretary Ryan, in a case where there was a contest on account of the selection made under the Act of June 4, 1897 (30 Stat. 36) says:

“Prior to the act of 1878 any public lands not excepted by law because of their valuable mineral deposits, salt, etc., in general were not subject to disposal otherwise than under the pre-emption and homestead (or settlement) laws until after a public cash offering. The settlement laws imposed conditions of residence, improvement, and cultivation, compliance with which involved considerable expense and lapse of time before a title could be obtained. There were also many tracts that because of their rocky or heavily forested condition were left unentered under the settlement laws because unsuitable for the homes of an agricultural resident population. In view of such facts, the law of 1878 (20 Stat. 89) applicable only to certain mountain States, afterward, August 4, 1892, (27 Stat. 348), made applicable to all the public land States, provided that lands—

valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold



. . . at the minimum price of two dollars and fifty cents per acre, and lands chiefly valuable for stone may be sold on the same terms.

“This act merely opened unoffered lands of this general description to private cash purchase in limited quantity, at an enhanced price, prior to its public offering. It was not the making of a new classification of lands that could be sold only under the act and only at the price fixed. Such lands, if not purchased under this act in advance of their public offering, upon being offered were subject to private cash entry or warrant location like any other public lands, not reserved from sale or entry. They became subject to settlement entry under the homestead law, the timbered or stony character and unfitness for cultivation being regarded merely as a circumstance to be considered in passing on the good faith of the settlement entryman. *John A. McKay* (8 L. D. 526); *Porter v. Throop* (6 L. D. 691); *Wright v. Larson* (7 L. D. 555); *Keller v. Bulington* (11 L. D. 140); *Harper v. Eiene* (26 L. D. 151).

“It is thus clear that the mere fact that the land is more valuable for the timber or the stone therein does not exclude it from appropriation under lieu selection or homestead entry. if not of mineral character.”

While it is there stated that lands that are chiefly valuable for timber or stone are not necessarily excluded from appropriation under the lieu selection or homestead entry, still the case is a distinct recognition of the changed policy of Congress evidenced by the Act of June 3, 1878, and the Act of August 4, 1892, amendatory thereof, and as we shall presently see, under

the rules as to attempted entries under the Homestead Act, shows that these lands of the kind involved in suit, are not adapted to settlement and are therefore not subject to entry under the settlement laws. This fact was distinctly recognized in the case of *Harper v. Eiene*, 26 Land Decisions 151, where Secretary Bliss says:

“It was alleged in this proof that he had established residence on the land in May, 1890; that he has since resided there except for short absences, but that his family, consisting of wife and one child, have never resided there owing to ill health and bad condition of the road and rough weather; that his improvements consist of a house fourteen by sixteen, a barn, three acres under cultivation three acres slashed, an orchard, some fencing, and a road all valued at \$750, and that he has raised crops two seasons on one and one half acres. This proof was approved and final certificate issued July 8, 1895.

“On November 6, 1895, Jennie E. Harper filed in the local office an affidavit of contest against said entry, alleging that the improvements upon which the final certificate was based consist of the remains of a small house twelve by fourteen feet and a small shed twelve by twelve feet, both burned, and an acre of ground underbrushed, with green timber standing thereon; that the value of said improvements would not exceed one hundred dollars; that both the residence and improvements of the homestead claimant are the merest pretense; that said tract is heavily covered with merchantable timber and is chiefly valuable therefor; and that the same is wholly unfit for agricultural purposes.”

See also *Rowley v. Hayes*, 29 Land Decisions, 606.

*Patton v. Quackenbush*, 35 Land Decisions, 561.

In the last case cited Secretary Garfield says:

“At that time, as shown by the evidence, the permanent improvements were as follows:

“From about one-fourth of an acre, on which the cabin and shed stood, the trees had been felled and the logs and underbrush removed, but twenty-one stumps remained standing. This one-fourth acre was inclosed by a rail fence, outside of which on about one and one-half acres the trees had been felled and the brush partly burned but the logs and stumps all remained. Outside of said enclosure no breaking of the soil had been attempted; within it there had been some stirring done in spots but it had never been plowed or harrowed. There was a habitable cabin, and also a shed built of round poles in which the entry-man claims to have lived from September, 1901, until late in the fall of 1902, when the cabin was completed, though he had no stove. Some work had been done on the ‘trail’ by which access was had to the land. For water supply a hole had been dug about five feet deep, and partly curbed to hold surface water.

“As to the soil on this tract and its value for farming purposes, if cleared of the timber and brush, the testimony of the witnesses for contestant and claimant is irreconcilable. The former, experienced timber cruisers, state that there are eleven million feet of timber worth at least one dollar per thousand feet; that the soil is clay and gravel, with a covering of decomposed vegetation or peat, peculiar to cedar swamps, which will burn when drained of water, and which is prac-



tically worthless for farming. The latter state that the soil is a fertile loam and that the land when cleared will in its raw state be worth twenty dollars per acre, and one of them estimates the timber at five million feet, but admits that he had not 'cruised' this tract.

"But all the witnesses, including the claimant, agree that it will cost two hundred dollars per acre to fell the trees and remove the logs and brush from the land, allowing the stumps to remain. And while, under the law cited, land 'unfit for cultivation.' and lands, the cost of reducing which to cultivation is practically prohibitive, may be taken under the homestead law, these questions have a decided bearing upon the probable good faith of the entry. It is also true that the homestead law does not require residence after final proof, yet where it is claimed that such land is claimed as and for a home the fact that the claimant does not return to it after final proof has a bearing on the good faith of such claim and entry.

"Taking into consideration the value of the timber and quality of the soil as shown by preponderant competent testimony, the meagre residence and improvements, in view of his financial ability, the early final proof and termination of such residence, and the fact that claimant never had a domestic animal or fowl on this land or otherwise, indicated an intention of permanently residing thereon, the Department is unable to find in the record any facts on which to base a holding that the entry was made in good faith, for a home, and not for speculative purposes, to dispose of the timber on the land."

In further recognition of the non-settlement character of certain lands, Congress passed the Act of June 11, 1906, (34 Stat. 233) which authorized homestead entries within national forests. This act has been grossly abused, as shown by the statement of Mr. Henry S. Graves, Chief Forester, and shows that even under the careful administration of this statute, lands have been entered which were chiefly valuable for timber.

In *Davis v. Gibson*, 38 Land Decisions 265, Assistant Secretary Pierce says:

“If such charge can be sustained, it would result in the cancellation of the entry, for the reason that no entry can be made in good faith of land that is not susceptible of cultivation where the entryman must have had knowledge of such condition. The law requires that an entryman must not only reside upon and improve his claim but must cultivate it. ‘The purpose of the homestead law is to secure the establishment of actual agricultural homes upon the public lands. The improvement and cultivation of the land are necessary acts to that end.’ (George Hathaway, 38 L. D. 33, 34.

“If this land cannot be adapted to any agricultural use, there can be no valid entry of it under that law, and if such condition was known to exist by the entryman at the date of his entry it was not made in good faith and should be cancelled.”

In *Finley v. Ness*, 38 Land Decisions 394, 398, Assistant Secretary Pierce says:

“Land covered with valuable timber may nevertheless be entered under the homestead law where the character of the land is such that it would be suitable for agricultural use if the timber were removed. See *Jones v. Aztec Land and Cattle Company*, 34 L. D. 115, *Patton v. Quackenbush*, 35 L. D. 561. But land not adaptable to any agricultural use is not subject to homestead entry. See *Davis v. Gibson*, 38 L. D. 265. The character of the land here involved, as shown by the record, is fairly stated in the opinion of the local officers above given.

“The unfitness of this land for agricultural use to any reasonable extent is established, and, considering the great amount of timber thereon and the rough and almost worthless character of the land for agricultural purposes if cleared, strong reasons for suspecting the good faith of Ness in making application therefor under the homestead law, are apparent.”

In *Winninghoff v. Ryan*, 40 Land Decisions 342, decided January 2, 1912, an extended review of that case by Assistant Secretary Adams, typifies land of the general character of the lands involved in suit. It is there stated—

“The testimony is voluminous and conflicting. That of contestant’s witnesses shows that the land embraced in this homestead is exceedingly mountainous, precipitous, rough, broken with canyons, and impossible of cultivation. The land is very heavily timbered, carrying approximately fifteen million feet of merchantable timber of an esti-



mated value of from one to two dollars per thousand. All of the contestant's witnesses agree that the soil is very poor, being composed of clay and gravel with numerous rocks intermixed, and would not raise agricultural crops even if the timber were cleared; further the steepness of the land is such that it would be impossible to cultivate it even if the soil were sufficient. Several of the witnesses are timber cruisers, and some of them were parties having contests against homestead entries in that vicinity. They visited the land at various times in the summer of 1908. The sole improvement found was a small log cabin, unchinked, with a door standing unhung. Across the small creek from this cabin was another built of shakes, with a log addition. They testified that both of these would be uninhabitable during the winter time and rainy season, as the snow would melt and the water would leak in. A small patch of from one-fourth to one-third of an acre had been slashed, i. e., the trees had been cut down, but the stumps were standing, and in this patch there were nine or ten of these stumps and four or five large trees standing. They found no cultivation whatever, the only evidence of that nature being that on top of one of the large stumps the surface had been boxed in by shakes, some vegetable mold gathered and placed there, and a few strawberry plants planted, and also one onion planted, which was supported by being tied to a stick. The timber was so dense that sunlight could reach the ground for a period not to exceed one hour a day, which would make the growing of crops impossible; the dampness would occasion mold to settle upon the cabins and their contents, and render them unhealthy to live in. The sole means of access to the claim is

a difficult and dangerous train over the mountains from the nearest settlement, some fifteen miles away. The houses upon the land were such as farmers would use for hog pens or chicken houses, and would not be fit places of habitation for a man and his family. There were no domestic fowls on the place, and at the time of their visits, except once, there were no signs of habitation around the cabins, which appeared to be abandoned. There was no chimney to either of the cabins, but in the shake cabin there was a square hole in the roof from which smoke, on one occasion, was pouring. Between this land and the nearest towns there is a large area of vacant public land, upon which the timber has been burned. They found no homesteads in this area, and did not see any homestead until they struck the green timber. They further testify that it would cost \$300 an acre to clear this land of the timber. and that such expenditure would be useless, as the land would have no value for farming after the timber was removed. One of the witnesses testifies to a conversation with Ryan, in which Ryan told him that he was living in Aberdeen, Washington.

“Photographs of Ryan’s, or his wife’s, house in Aberdeen, and of the house in Kalama, to which they apparently moved later, were introduced in evidence.

“Notice of the contest was served upon Ryan in Aberdeen, Washington, and also another at Kalama, Washington, while he was there attending as a proof witness in another homestead entry. The directory of 1905, of Aberdeen, showed that Mrs. Ellen Ryan, milliner, and William L. Ryan, timber cruiser, were living at 306 Wishkah Street, and that of 1907 gave simply the address of Mrs. Ellen Ryan.

"This testimony further tends to show that it would be much easier to clear the land already burned over than the land embraced in this homestead, and that, from all the conditions surrounding the entry, the witnesses were of opinion that the entryman's sole purpose was to acquire the timber. It is also shown in their testimony that it would be a dangerous place for a man to live with his family, and that the snow in the winter time would be four or five feet deep. It also appears that the only method to get farming implements to the land would be to take them apart and strap the parts to the backs of pack animals, putting them together again upon the land. All produce raised would also have to be packed out, offering the same difficulty as with tools.

"Most of the witnesses on behalf of contestee are persons having heavily timbered homesteads in the near vicinity of Ryan's. Their testimony is directly in conflict with that of the contestant's witnesses as to the amount of clearing and the question of whether Ryan had a garden or not. They contend that the photographs of the clearing taken by the contestant do not show all of the clearing, and are not fair. They do not dispute the heavily timbered character of the land. Some attempt is made to prove that the soil is good and could be farmed after the timber had been cut. The majority of them testify to having seen Ryan living on the land, at various times; some of them have eaten and slept with him in the shake cabin. The log cabin adjoining the shake cabin, it is testified was used by Ryan as a bath house for the purpose of relieving his rheumatism. The cabin seems to have been well equipped with homemade furniture, i. e., furniture hewn out of



the timber which grows upon the land. He also appears to have kept it well supplied with provisions, and also brought in a mattress and springs. They testify that in the cleared space Ryan had a garden for several years, consisting of potatoes, strawberry plants, lettuce and beans, although their testimony is somewhat conflicting as to the exact location of the garden and its contents. They testify that this garden was in existence at the time contestant's witnesses examined the land, and that any person examining the clearing could not have failed to observe it. During the course of the trial one witness went to the land and secured samples of potatoes, onions, strawberry plants and beans, which, it is alleged, came from the Ryan land. The strawberry patch on the stump, it was claimed, was planted there merely for the purpose of amusement or experiment. According to their testimony a county road had been surveyed out, which would lead within two hundred yards of the land, and would furnish an easier method of ingress and egress. Ryan's own testimony is that he first initiated his claim to this land in November, 1897, at which time the log cabin to the east of the small creek was already upon the land; that he constructed the shake cabin in about 1902; that his home has been on the land ever since 1902, at least; that his wife and family lived in Aberdeen, Washington, and removed to Kalama, Washington, after service of the contest notice. He admits that his wife and family never lived upon the land, but claims that his wife refused to do so, as she was desirous of keeping her children in town in order that they might attend school. He states that they had a serious disagreement upon this point, and that his

wife has been self-supporting, the houses in Aberdeen and Kalama being rented by her, she paying the rent out of money earned in conducting a small millinery store. It is admitted that no produce has ever been raised on or sold from this particular land, or any other homestead in that vicinity. The witnesses for contestee contend that it is easier to clear land of green timber than burnt timber. Ryan's testimony is corroborated by his wife, who testified that she visited the land but twice, in the summer of 1906 and the summer of 1907, merely as an outing. At one time she states that in August, 1907, she wrote her husband requesting him to come home, at Aberdeen, and then changes it to read her home in Aberdeen. The contestee's testimony is further to the effect that the snow does not lie upon the ground to exceed fourteen or sixteen inches in the winter time, and that Ryan's shake house was at all times water-tight, comfortable and inhabitable. Ryan's business appears to have been that of a timber cruiser and locator. The garden was apparently unfenced; and no domestic animals of any kind, except pack animals used in taking in supplies, were ever upon the land. That Ryan has spent considerable periods of time upon the land is established in his testimony and that of his wife, the testimony of the remaining witnesses merely being to the effect that they saw him there at different times.

"In rebuttal, the contestant called attention to the fact that some of the bean plants introduced in evidence were in flower at that time (October); that the potatoes introduced in evidence could not have come from the potato plants, as there were very minute potatoes only beginning

to form on the roots; that the sample onion introduced showed the old seed onion, no new onion having formed. The plants also showed the effect of frost, and also, from their appearance, indicated that they had been grown in the shade. The purport of the witnesses' testimony in rebuttal is to the effect that the samples so introduced could not have been raised upon the land in question, as the soil was too poor to raise even the specimens introduced in sur-rebuttal. The contestee put in testimony to the effect that the soil was sufficient to raise such specimens.

"From the above the following conclusions are warranted: The land is exceedingly valuable for its timber, being worth from fifteen to thirty thousand dollars. The register and receiver and the Commissioner found that the land was too rough, broken and heavily timbered, to be capable of cultivation, and the weight of the testimony substantiates their finding. Ryan appears to have spent a considerable portion of his time upon the land, and if his own mere physical presence thereon is sufficient, the Department's decision is correct. The register and receiver and the Commissioner apparently were not much impressed with the excuse offered by Ryan and his wife for the failure of his family to reside thereon. As their testimony is uncorroborated in that regard, and as they are the chief parties in interest, the Department concurs in the findings below as to that aspect of the case. A small garden patch may have been cultivated by Ryan, but it should be pointed out that the place so cultivated was along a small creek, where possibly some small amount of level ground might be found. The weight of the testimony shows that crops planted there could not mature,



due to the lack of sunlight and the lateness of the season giving them no time to ripen.

“It has long been the rule of the Department that the mere fact that lands are heavily timbered does not exclude them from homestead entry. In the case of *Davis v. Gibson* (38 L. D. 265), it was held that land unadapted to any agricultural use is not subject to entry under the homestead law, the reason for the inadaptability in that case being the fact that the land was a shellmound overflowed by tide waters. Logically, there is no distinction between that case and the one here involved, as the heavy growth of timber, the rough character of the land, and the poorness of the soil prevent any adaptation of the land to agricultural purposes, even assuming that agricultural implements could be brought to the land and used when there. So, in the case of *Finley v. Ness* (38 L. D. 394) the Department held that land covered with valuable timber can be entered under the homestead law where it is of such character that it would be suitable for agricultural use if the timber be removed, but that land of a character not adaptable to any agricultural use is not subject to homestead entry. In the case of *Johnson v. Bridal Veil Lumbering Company* (24 Oreg. 182-33 Pac. 528), cited by counsel for the contestee, the Supreme Court of Oregon held that the fact that the land is unfit for cultivation and valuable chiefly for timber, did not prevent homestead entry thereof. The court said:

“ ‘It might be safely said that a homestead claimant who desired such a tract for a home and agricultural purposes had not exercised very good judgment in the selection, but if he could grow crops thereon he would be entitled, under the law,

to make his final proof and receive his patent. His right to make final proof and obtain a patent rests upon his cultivation of the soil and not upon the exercise of his judgment in the selection of his homestead.'

"In the case of *J. J. McCaskill Company v. United States* (216 U. S. 504, 510), Justice McKenna states the requirement of the homestead law as follows:

" 'It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the 'application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person.' That applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses.'

"Under the above decisions the lands here involved must be held not subject to homestead entry, as it is impossible to escape the conclusion that the entryman has no purpose of establishing a home and using the land for cultivation, as required by the law, but that his sole purpose is to obtain the valuable timber growing upon the land, which is so heavily timbered that the cost of clearing is prohibitive, and which even if cleared, would be impossible of cultivation, due to the poor quality of the soil and its rough and broken character. The Department concurs in the finding of

the Commissioner and that of the register and receiver, that the contestee did not take this land for a home; that his actual place of residence at the date of entry, and at the date of contest, was with his family in Aberdeen, Washington, until he moved them to Kalama just prior to the hearing; that he failed to establish a bona fide residence on the land to the exclusion of his home in Aberdeen, and that his bad faith is clearly shown by the testimony."

This is the latest expression of the Land Department by its highest administrative head. It is distinctly applicable in its terms to the so-called actual settlers represented by Mr. A. W. Lafferty, who are cross complainants in this suit. The pretended settlement by these so-called actual settlers would be found under this ruling to have been made in bad faith and therefore the lands not subject to entry under the Homestead Act, and yet it is gravely asserted in this case that the company should sell these lands to actual settlers, or should have done so, while at the same time the United States under the Homestead Act, as now construed, and under the Timber and Stone Act has held and was bound to hold that upon the facts the lands were not subject to entry under the Homestead Act. It is strangely inconsistent with good faith upon the part of the United States to contend that the company should sell these lands to actual settlers, when, at the same time, there is no law under which the United States can permit the lands to be entered or appropriated by actual settlers. Furthermore, it will be remembered that on March 3, 1879, (20 Stat. 472)



Congress passed an act granting additional rights to homestead settlers on public lands within railroad limits, by which the former homestead applicant, as to the even sections within the limits of this grant of July 25, 1866, who had been limited to 80 acres, could enter an additional 80 acres adjoining the lands embraced in his original entry. This was a modification of the contract, in that it reduced the number of possible settlers on the even sections from eight to four.

We have thus somewhat laboriously discussed the settlement laws, their modification and repeal since the passage of the Act of April 10, 1869, and the Act of May 4, 1870, and the decisions of the courts construing the settlement laws and the Timber and Stone Act of June 3, 1878, so that the court, construing the Homestead Act as applicable to these lands involved in suit, must see that in the nature of things all, or nearly all, of such lands could not be entered in good faith under the Homestead Act, and such act cannot be deemed applicable, or if applicable, it would be impossible for the so-called settler to comply with the same in good faith or to obtain title from the United States based upon an attempted entry under the Homestead Act. If this be so, how can it be contended that the company is bound or was bound to sell these lands to so-called actual settlers in order that it may thereby carry out some supposed policy of the United States as to the settlement of the public lands. It must be assumed that the company in some way, if obligated to sell to actual settlers in quantities not exceeding 160 acres, must ascertain who are qualified to purchase.

That is to say,—the company must, at its peril, fix the status of the intending purchaser, and such purchaser must be an actual settler. If, by analogy, the Homestead Act applies, then such actual settler, under the law as it was in effect on April 10, 1869, and May 4, 1870, must reside upon and cultivate this land for a period of five years before he shall be entitled to complete the purchase, and yet, if the company should refuse to sell or accept the \$2.50 an acre on the first day of the settlement, there is nothing in the statute which secures to the applicant the right to enforce an immediate transfer of the title or that obligates the company to convey the land until the company has carried out the assumed public policy in seeing that these lands are sold only to actual settlers, and presumably the company must administer the grant in the same way and in the same manner as the United States would administer the Homestead Act as to the even sections, with the difference that up to March 3, 1879, such homestead applicant could only enter 80 acres within the limits of the grant, but after that date, could enter 160 acres. It must be apparent to the court beyond any sort of doubt, that at least ninety per cent of these unsold lands in their present condition are unfit for cultivation, and that the expense of clearing the lands and fitting them for settlement or cultivation would be prohibitive, and that the chief value of at least ninety per cent of these lands is their timber character. The United States, under the rulings of the Land Department, in obedience of the decisions of the courts construing the Timber and Stone Act of June 3, 1878,

would forbid entry or settlement of a large percentage of these unsold lands, either under the pre-emption act, if it was in effect, or under the homestead act now in effect, for the reason, as the decisions show, that the lands are chiefly valuable for timber, and that the good faith of the entryman could not be shown, but the circumstances would, without question, show that the entries were being made of lands not adapted to entry and settlement under the Homestead Act and were being made under cover of pretended settlement, but in fact to secure the lands for the timber thereon. The company has the right to be guided in its administration of this grant by like rules. Indeed, it would be obligated by the terms of the act to see that the lands were sold only to actual settlers, and if it should sell to some person who was not an actual settler and who did not purchase for the purpose of actual settlement, and who did not reside thereon for the purpose of making the land a home, but who purchased the lands for speculation and because of their timber character, then, under such circumstances, the sale would be a fraud, not only upon the company but a breach of the condition imposed by the statute. For this breach, if the position of the Government is sound, the remaining lands could, at the election of the United States, be forfeited. Independently, therefore, of the said Timber and Stone Act of June 3, 1878, or the modification of the Homestead law, as we have shown, or the repeal of the pre-emption law impliedly waiving the provisions of the actual settler clause, it must be apparent to the court, under the testimony in this case



and under the rulings of the Land Department and the decisions of the courts which we have cited, that this condition has long since become impossible of performance, and that, indeed, it never was capable of such performance as may have been contemplated by the statute.

It will not be doubted that if this statute created a condition subsequent, and performance, at the time it was enacted, or the estate vested, was impossible, or was rendered impossible by the law or by the grantor—in this case the United States—the condition is void, performance is dispensed with, and the estate vested absolutely.

6 Amer. & Eng. Enc. of Law, 2nd ed., 506.

Scovill v. McMahon, 62 Conn. 378; same case,  
21 L. R. A. 58 and note.

In the note to the case last cited, it is said.

“The general rule of law with regard to conditions subsequent is that if the condition be impossible to be complied with, either by the Act of God or of the law or of the grantor, or if it be impossible at the time of making it, or against law, the estate of the grantee being once vested, is not thereby divested but becomes absolute.”

See 4 Kent Comm. 130.

This principle was recognized in *United States v. Arredondo*, 6 Pet. 691, 745, where Mr. Justice Baldwin, speaking for the court, says:

“According to the rules and the law by which we are directed to decide this case, there can be no

doubt, that they are subsequent, the grant is in full property, in fee, an interest vested on its execution, which could only be divested by the breach or non-performance of the conditions, which were, that the grantees should establish on the lands, two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant. No time was fixed for the completion of the establishment, and no new requisites or conditions appear to have been imposed. From the evidence returned with the record, we are abundantly satisfied, that the establishment was commenced within the time required (which appears to have been extended for one year beyond that limited by the grant), and in a manner which, considering the situation of that country, as appears by the evidence, we must consider as a performance of that part of the condition. Great allowance must be made, not only from the distracted state and prevalent confusion in the province, at the time of the grant, but until the time of its occupation by the United States. Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it *cy pres*, they will protect and save him from a forfeiture. 4 Dall. 203; 2 Fonb. 217-18, 220; 1 Vern. 224-5; 2 Ibid. 267 and note.

“The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law,

or has such matter been presented to the court as dispenses with the performance, and divests the grant of that condition. It is an acknowledged rule of law, that if a grant be made on a condition subsequent, and its performance become impossible by the act of the grantor, the grant becomes single. We are not prepared to say, that the condition of settling two hundred Spanish families in an American territory has been, or is, possible; the condition was not unreasonable or unjust, at the time it was imposed; its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance, after its cession to the United States, would be demanding the 'summum jus' indeed, and enforcing a forfeiture, on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves, at all events, justified, if not compelled, to declare, that the performance of this condition had become impossible, by the act of the grantors,—the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity, on such grounds as these, we are not either authorized or required by the law which has devolved upon us the final consideration of this case, to be guided by such rules, or governed by such principles, in deciding on the validity of the claimants' title. Though we should even doubt, if, sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The



proceeding is in equity, according to its established rules, our decree must be in conformity with the principles of justice, which would, in such case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

In *Board of Commissioners v. Young*, 59 Fed. 96, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, says:

"The heirs of the grantor brought suit in ejectment, claiming the right of re-entry for breach of the condition. The court held that, 'even if the condition was not performed, it appears to us that the nonperformance would in this case be excused, as being by act of law, and involuntary on the part of the lessees.' The court cited *Bac. Abr.* tit. 'Condition'; *Com. Dig.* tit. 'Condition'; and the case of *Brewster v. Kitchell*, 1 *Salk.* 198. The case of *Lord Grantley v. Butcher*, reported in 51 *E. C. L.* 115, is to the same effect.

"We are therefore led to the conclusion that if the title was a base or conditional one, yet the breach of condition relied upon as creating a right of re-entry is excused, because the breach was the act of the law."

In *Jones et al. v. C. & O. R. R. Co.*, 14 *West Virginia* 514, 523, the court says:

"But whether the condition be precedent or subsequent, if the act of the party, who imposed the condition, makes its performance unnecessary or impossible, the condition is no longer binding, and the estate conveyed by the deed, in which it is contained, is discharged therefrom. *Young v. Hunter*, 2 *Seld.* 203."

In *Vanderslice v. Hanks*, 3 Cal. 28, 41, the court applies a strict rule for breach of condition subsequent, where no time for the performance of the condition is specified. The court in that case says:

“Many cases have been decided by the Supreme Court of the United States involving the same question, arising in cases of grants made in Florida and Louisiana. There is, however, no case which I have seen where the grant has been rejected for the non-performance of the conditions, except when a time had been limited in the grant for the performance of the condition and it had never been performed. This was the case in *United States v. Mills’ Heir*, 12 Pet.; *United States v. Kingley*, 12 Pet.; *United States v. Drummond*, 13 Pet.; *United States v. Burgevin*, 13 Pet.; *United States v. Wiggins*, 14 Pet. While in the case of *Arredondo*, where no time was limited, it was confirmed, notwithstanding the nonperformance. The court says: ‘We now consider the conditions upon which the grants were made; there can be no doubt that they are subsequent. The grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions.’ ‘No time was fixed for the completion of the establishment. It is an established rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single.’

“The very same language, with but little alteration, might be applied to this case. No time was limited for the performance of the conditions, and the day before the country was ceded to the

United States, the right of Narvaez to fulfill the conditions was undisturbed and complete.

"It may be said that when no time for performance is fixed, the law will intend a reasonable time; but even if that be conceded, here was a method pointed out by which it should be determined; in the language of the grant 'it shall be denounced by another.'

"Then it follows that even if a reasonable time had elapsed, the denouncement by another, or some other action of the government to enforce a forfeiture, would be the only actual limitation as to time. There was no denouncement, and no complaint by the government. On the contrary, stipulating solemnly for his protection and enjoyment of his property, she cedes the country to another government, and thus, by her own act, puts it forever beyond his power to fulfill the conditions of his grant.

"Blackstone, speaking of conditional grants, says:

"These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffer himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant.' (2 Black. 157.)"

In *Burnham and another v. Burnham and others*, 79 Wis. 557, the court says:

"The rule of law is well settled, and in fact elementary, that, 'if a condition subsequent be possible at the time of making it, and becomes



afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor, or if it be impossible at the time of making it, or against law,—the estate of the grantee, being once vested, is not thereby divested, but becomes absolute.’ 4 Kent’s Comm. 130; Coke, Litt. 206 a.; 2 Bl. Comm. 156; 2 Jarm. Wills, 521; *Davis v. Gray*, 16 Wall. 230; *Culin’s Appeal*, 20 Pac. St. 243; *Merrill v. Emery*, 10 Pick. 507; *Parker v. Parker*, 123 Mass. 584; *Morse v. Hayden*, 82 Me. 227; *Merriam v. Wolcott*, 61 How. Pr. 377; *Jones v. Bramblet*, 1 Scan. 276; *Jordan v. Dunn*, 13 Ont. 267.”

We shall not discuss in detail the voluminous record containing the testimony as to the character, situation, and location of these lands. There is scarcely a quarter section of any value but what is chiefly valuable for the timber thereon, and the testimony shows that the applications to purchase, evidenced by many thousands of applications represented by the interveners and cross complainants in this suit, were made primarily, and it may be safely asserted, solely because of the timber value of these lands. The proof also shows that these lands are so heavily timbered or so rough and broken that they are unfit for settlement, and that to remove the timber where the soil is at all adapted to cultivation, would cost more than the lands are worth. It is, as it seems to us, a palpable fraud, not only upon the company but upon the settlement laws of the United States, to assume that these lands are adapted to entry and settlement under the Homestead Act, or that the company could, even if it so

desired, administer this grant in the spirit of the settlement laws and convey the title to actual settlers who may desire to settle upon the same for the purpose of making homes. The United States, in the passage of the so-called Innocent Purchasers Act of August 20, 1912, has recognized the non-settlement character of these lands. The report of Mr. Robinson, from the Committee on Public Lands, based upon which this statute was enacted, concedes the non-settlement character of the lands. The Congress of the United States, as early as June 3, 1878, recognized the non-settlement character of these lands by passing the Timber and Stone Act, and in the administration of this act, under the decisions of the Land Department and the construction of the act by the courts, has parted with a considerable proportion of the even sections within the limits of these grants as being chiefly valuable for timber and as not fit for entry or settlement under the settlement laws. Congress has still further recognized that these lands were not subject to entry by actual settlers; and has, to that extent, changed its public land policy by a repeal of the pre-emption laws on March 3, 1891.

Under these circumstances, is it consistent to hold that the company must perform its condition and must perform it under the penalty of forfeiture, when the United States, that is seeking to enforce the forfeiture, has declared that these lands are unfit for settlement, and that its own lands cannot be entered in good faith under the settlement laws. Not only is the condition impossible of performance, but it has been rendered

practically impossible of performance by the enactment of the various statutes modifying the original contract between the United States and the companies, and by the changed policy of the United States, under which persons who desire to acquire title to lands of the character involved in suit, obtain such title under the Timber and Stone Act and under the lieu selection act, thereby depriving the company of opportunity to secure the sale of its lands of the same kind, and thereby withdrawing by statutory enactment, a large body of citizens who might otherwise have applied to purchase these lands as actual settlers.



## VII.

IF THE TERMS OF THE "ACTUAL SETTLER" CLAUSE BE SO INDEFINITE AND UNCERTAIN, AS THAT THE COMPANY COULD NOT, UNDER ITS TERMS FAIRLY CONSTRUED, ASCERTAIN THE LEGAL MEASURE OF ITS DUTY, SO AS TO PERFORM THE SAME, AND IF THE LAW THUS FAIRLY CONSTRUED IS NOT ENFORCIBLE AS A COVENANT, OR TRUST, OR CONTRACT, FOR THE BENEFIT OF "ACTUAL SETTLERS," IT IS EQUALLY AND FOR THE SAME REASONS NOT ENFORCIBLE AS A CONDITION SUBSEQUENT. THERE CAN BE NO CONDITION SUBSEQUENT, WHETHER CREATED BY CONTRACT BETWEEN PRIVATE PARTIES, OR BY GRANT BY DEED, OR BY LEGISLATIVE GRANT OF PUBLIC LANDS, TO A PRIVATE PARTY ASSENTING TO AND ACCEPTING SUCH GRANT, WHICH IS NOT CLEAR, DEFINITE AND CERTAIN IN ITS TERMS. NO BREACH CAN ARISE OR BE ASSIGNED UPON A CONTRACT, DEED, OR GRANT, OR LEGISLATIVE GRANT, WHICH IS SO INDEFINITE OR UNCERTAIN IN ITS TERMS, AS THAT IT DOES NOT CLEARLY AND NECESSARILY APPEAR EXACTLY WHAT THE GRANTEE MUST, (NOT MAY) DO; IN WHAT MANNER THE THING REQUIRED TO BE DONE SHALL (NOT MAY) BE DONE; FOR WHOM OR WHAT PERSON IT SHALL (NOT MAY) BE DONE; AND WHEN THE THINGS REQUIRED SHALL BE DONE. IF THE ACT TO BE PERFORMED IS NOT REQUIRED TO BE DONE IN SOME DEFINITE AND CERTAIN WAY, FOR A DEFINITE AND CERTAIN CLASS OF PERSONS, AND FOR A DEFINITE AND CERTAIN PART OF THE LANDS GRANTED, WITHIN A CERTAIN AND DEFINITE TIME, UNDER CERTAIN AND DEFINITE RULES AND REGULATIONS PRESCRIBED BY LAW DEFINING THE "ACTUAL SETTLER," THE TIME AND CONDITIONS OF SETTLEMENT,

AND THE PROOF OF SAME, THERE CAN BE NO ASSERTION OF ANY BREACH BY THE GRANTOR, NOR RE-ENTRY BY LEGISLATIVE DECLARATION OF FORFEITURE, OR OTHERWISE. THE GRANTOR CANNOT FORFEIT THE ESTATE GRANTED, FOR BREACH OF A CONDITION, THE TERMS OF WHICH CANNOT BE SPECIFICALLY AND DEFINITELY FOUND IN THE LANGUAGE OF THE CONDITION.

AS A COVENANT, TRUST, OR CONTRACT, THE "ACTUAL SETTLER" CLAUSE IS NOT ENFORCIBLE, AND THIS COURT HAS SO HELD. (OPINION, VOL. II, PAGES 696-791-818) AS A CONDITION SUBSEQUENT, IT IS LIKEWISE NOT ENFORCIBLE. THE GRANTEE IS NOT OBLIGATED TO WRITE INTO THE STATUTE, RULES AND REGULATIONS BY WHICH THE PRE-EMPTION OR HOMESTEAD LAWS COULD BE EXECUTED, AS TO THESE LANDS, NOR DOES THE STATUTE ADOPT SUCH RULES OR REGULATIONS AS TO PROCEDURE, OR MAKE THE PRE-EMPTION OR HOMESTEAD ACT A PART OF THE "ACTUAL SETTLER" CLAUSE.

It is respectfully submitted that these words, whether creating a covenant or condition, are so uncertain as that the proviso is void and not enforceable for the following reasons:

(a) There is no direction or requirement that the grantee beneficiary, or its successor or vendee, shall sell the lands at all. Unless it was contemplated that the lands would all be sold pending construction so that the aid contemplated by the statute could be furnished at that time, and that impliedly, at least, the Company would offer these lands to actual settlers



who would be sure to apply during this period, there is nothing which would require the Company to attempt to offer the lands. The covenant or condition is a negative, there is no breach for non-action,—it is only when there has been affirmative action by the Company and a sale voluntarily made contrary to the limitations, that any breach can be asserted.

(b) The contract is void as a covenant or condition because there is no definitely ascertained person or class of persons named as beneficiary of the trust, or as entitled to enforce the covenant or condition. It cannot be determined from the actual settler clause whether it was contemplated that such actual settler should come under the provisions of the homestead act or under the provisions of the pre-emption act, the only two settlement laws in effect at the time the law was passed. It is at least doubtful which class of settlement was contemplated.

(c) The contract is void as a covenant or condition because it does not fix any time within which the Company or its assigns shall sell any of this land to any present, future or prospective or possible actual settler.

(d) The contract is void as a covenant or condition because it does not fix any definite area of any of this land to be sold to any present, future, prospective or possible or any actual settler.

(e) The contract is void as a covenant or condition because it does not provide any tribunal for determination of status of any person applying to purchase who may claim to be an actual settler, or to determine priority of application between two or a multitude of applicants desiring to purchase any particular parcel



of these lands, and it does not provide any rule or regulation by which the Company must be guided in determining who are actual settlers, a priority of settlement between contestants, or the length of time such person shall reside upon the lands, or any method by which proof shall be taken available to either party, showing that the applicant is a qualified person entitled to take, and has resided upon and cultivated the land as required by the settlement law. The Company could not exercise a discretion in this respect, for if it might exercise a discretion, then there was no contract. but its enforcement, or the terms of its enforcement, or the methods by which it should be enforced, depended upon the discretion of the administrative agent, in this case the Company.

(f) The contract is void as a covenant or condition because the Company may refuse to sell its lands, and the proviso does not require any sale at any time, to any person, in any quantity, nor does it provide any remedy in case the Company does refuse to sell.

(g) The contract is void as a covenant or condition because unreasonable in this, that if there should be a breach of the condition as to any one of the twenty-five thousand or more quarter sections granted, such breach being continuous, several and necessarily numerous, could not be enforced as to the unsold quarter sections remaining after several and separate breaches had occurred. The grant was one in its entirety, and for a single breach of this condition, if valid and enforceable, the entire unsold portions of the grant would be forfeited and thereby the future actual settlers

would be deprived of their rights to apply for and purchase these remaining unsold lands.

(h) The contract as a condition or covenant is void in this that it lacks mutuality. There is no obligation assumed by the United States that actual settlers will ever apply to purchase or will buy, and no obligations of any kind are assumed by the class known as actual settlers. There is no time fixed when any purchase or settlement, if at all, shall ever be made. As a matter of fact from April 10, 1869 up to acceptance of final construction of road, November 8, 1889, no actual settler ever applied to purchase these lands so far as is disclosed by the record and failed to obtain title to the lands for which he applied.

It is stipulated (subdivision 6, item 8, paragraph e, page 15, stipulations as to the Facts)—that only 163, 430.28 acres were sold by the Company prior to May 12, 1887, and nearly all of these lands were sold to actual settlers in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and for prices slightly in excess of \$2.50 per acre. It is manifest that if the Company pending acceptance of completion of road on November 8, 1889, could not have sold to actual settlers in area substantially in excess of the amount sold up to May 12, 1887, this illustrates in a practical way that the grant had failed in its primary purposes, to aid in construction of road. If it must be held that the lands could only be sold to actual settlers in the quantities specified, for the prices limited, and if such lands must

continue to be so sold indefinitely, it illustrates in a most forcible way the lack of mutuality in the alleged contract, and it is elementary that a contract lacking in mutuality is not enforceable. We need not cite authority to the effect, if an agreement is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, or if the court cannot for that reason enforce it, that there is no obligation, and therefore no contract.

9 Cyc. 248.

It is also a fundamental rule that a contract relating to the sale of lands should describe or designate the terms to which it relates, that is to say, the contract of sale must be certain or it must be so certain as that it can be made certain. In the case under consideration the actual settler clause is affirmatively uncertain in respect to the quantity of land to be sold, and in view of the fact that no obligation rests upon the Company to sell any of its lands, even conceding there is an obligation to sell a part of a quarter section to an applying settler, it could satisfy the contract by a sale of a single forty to an intending actual settler. If it might do this at its election, it could satisfy the statute by tendering a deed to the applicant conveying eighty acres. There is no minimum area prescribed. There is, therefore, no contract which is enforceable.

29 Enc. of Law. (2d Ed.) 592.

The District Court in its printed opinion, in this case (Transcript Vol. II, pages 783-806), has held that the language of the actual settler clause is not enforceable by the beneficiaries, or, for that matter,



by the United States, either as a trust or covenant. In the course of the opinion the Court, speaking of the administration of the grant, says:

“The land is to be disposed of to no specific person, but to actual settlers, in quantities not greater than 160 acres to each person—a great class of persons—and it was not intended that the bounty should be distributed among the entire class; no single third party can come forward and demand any specific tract of land from the company. This demonstrates the difficulty of selling to actual settlers without the adoption of some rule or regulation for determining who are actual settlers, and to test their good faith. In fact, in the administration of the sale of this grant, the grantee is given considerable discretion. It may require actual settlement upon the tract selected; it may require reasonable improvements; and it may require residence for a reasonable time to insure good faith. It might regulate the payments, requiring cash in hand, or deferred payments; it might regulate the quantity of land to be sold to each person, not exceeding 160 acres to any one person; and it might regulate the price, not to exceed \$2.50 per acre. Indeed, it has a reasonable discretion as to when it shall open up the lands to occupancy and settlement, so that the lands may be disposed of to its advantage, as well as to the advantage of the settlers. How can it be said, then, that Congress has made the offer of sale, to which the grantee has acceded, and therefore that any one, coming forward asserting himself as intending actual settlement, and tendering the price, concludes a bargain with the grantee for the purchase of 160 acres of land? Such was not the in-

tendment or purpose of Congress, and such is not the effect of the grant. Nor is the person claiming to be a settler, who has gone upon the land and is in occupancy of the tract selected; in any better position. There can be no purchase, either by right of settlement or otherwise, until the grantee or its successor has offered the lands for settlement and sale."

It is respectfully submitted that a contract which gives to the vendor any discretion as to the terms upon which the sale shall be made, the character of settlement upon the lands to be sold, the extent and character of the improvements, the duration of residence, the manner of payment, and all like questions, is not a contract within the meaning of the law. whether the instrument or writing is to be construed as a covenant or condition. The language of the actual settler clause creates a contract if it is sufficiently definite and certain to be binding upon any one. It must be construed like any other contract, excepting, as we have shown, it must be strictly construed, first, to ascertain whether the language creates a condition subsequent, and, second, whether, if it does create a condition subsequent, it is capable of enforcement, and in determining that question the rule of strict construction must obtain. If that be true, it follows as of course, that if there is any discretion as to material matters left to the vendor as one of the supposed contracting parties, either as to terms of purchase, amount of purchase, and conditions of purchase, it is then for all essential purposes unilateral and not enforcible. If it

be not enforceable as a contract and void for the reasons we have shown, it cannot be valid as a condition subsequent, or be the basis of a forfeiture or a right of re-entry, or the foundation of a possibility of reverter for breach of the alleged condition. Before forfeiture, whether by act of Congress or by judicial inquiry and decision, the only right which the United States had was a chose in action, a mere possibility of reverter. It was not an estate or a reversion, or any interest in these lands. It being a mere cause of action which it may bring, or omit to bring, at its pleasure, the United States must be able to point to the specific terms of the contract containing the conditions which have been violated and which gave rise to the cause of action to be asserted.

It is respectfully submitted that there is no distinction or difference in principle between a covenant or a trust on the one hand, and a condition on the other, as to whether or not the words construed created a valid and enforceable obligation.



## VIII.

IF THE "ACTUAL SETTLER" CLAUSE BE A CONDITION SUBSEQUENT, CERTAIN AND DEFINITE, SO AS TO BE OTHERWISE ENFORCIBLE, THEN IT WAS REPUGNANT TO THE GRANT, AND COULD NOT HAVE BEEN ENFORCED WITHOUT DESTRUCTION OF THE PRIMARY AND DOMINANT PURPOSE OF CONGRESS TO AID IN CONSTRUCTION OF ROAD. IF THE LAND THUS SUBJECT TO SALE COULD NOT HAVE BEEN SO SOLD IN TIME TO GIVE THE AID INTENDED, THE CONDITION WAS DESTRUCTIVE OF THE FEE INTENDED TO BE GRANTED, AND THE CONDITION MUST GIVE WAY, AS REPUGNANT TO THE GRANT.

In the opinion of Samuel L. Wilson of November 11, 1871. (Government's Exhibit 109) and submitted to the Secretary of the Interior, as we have shown, attention is called to the fact that if the actual settler clause in the act of 1869 is construed as a condition applicable for all time, until every parcel of the lands granted shall have been sold, that the act of April 10, 1869 in effect would repeal by implication the grant made by the act of July 25, 1866; that the company could not mortgage its lands because such mortgage contemplated the possibility of foreclosure; that if none but such actual settlers could purchase under the limitations and restrictions named, such mortgage would be practically, and in fact, prohibited.

It was further argued by Mr. Wilson that repeals by implication were not favored, and that therefore Congress could not have intended to have made the

grant ineffective and prevented that necessary aid in construction of road which the original grant contemplated.

Assuming, for the purposes of the argument, that Secretary Delano technically and properly construed the words of the actual settler clause to mean that the sales could be made only to actual settlers under the limitations thereof, it may well be that the subsequent silence and acquiescence of the land department from that date, and the acquiescence shown upon the part of the United States, are accounted for upon the assumption, either that these words were considered as a good faith promise or covenant of the same character as that created between the United States and the State, when grants were made to the State for particular purposes, or it may be assumed that the United States, through its land department recognized that the actual settler clause provision was repugnant to the grant and was therefore void.

It is elementary that if an estate is granted or conveyed in fee simple, and in the instrument granting or conveying the same a provision occurs which, if construed literally, would destroy or impair the estate thus conveyed or granted, that such provision is deemed repugnant to the grant and therefore void.

In *Varner v. Rice*, 44 Ark. 236, 250, the court says:

"It is certainly a well settled rule of law that where property is conveyed with conditions as to its devolution. use or enjoyment which are repugnant to the nature of the estate or interest

granted, the grant prevails untrammelled by the conditions. It becomes absolute. Public policy, too, certainly requires that all property in the hands of its owners should be governed by uniform laws, as to the powers of the owners over it. *Stukely v. Butler*, 1 Hobart, 168; *Bradley v. Peixoto*, 3 Vesey Jr., 324; *Greenleaf's Cruise*, Vol. I, tit. 13, chap. 1, sec. 2, p. 466, 2d ed., and note."

We have already fully discussed the primary and dominant purpose of Congress, and, as we think, have shown that such purpose must be paramount in order that there should be the aid in construction of road intended by Congress. In the light of such purpose, if it must be held that the words of the actual settler clause created a valid and enforceable condition subsequent, it must necessarily follow that such enforcement would destroy this great purpose and deprive the company of the benefits intended and the aid which Congress offered. The Court must therefore apply the strict rules applicable to the construction of conditions subsequent, and in order to avoid forfeiture and give effect to the intention of Congress, hold that the limitation or restriction is void as repugnant to the grant.

See also *Executors of McDonogh, et al., v. Murdoch et al.*, 15 How. 367, 412.



## IX

THE "ACTUAL SETTLER" CLAUSE CONTEMPLATED THAT THE SALES OF LAND AND CONSTRUCTION OF ROAD SHOULD BE CONCURRENT. IT WAS THE INTENTION OF CONGRESS THAT THE LANDS GRANTED SHOULD BE "APPLIED TO THE BUILDING" OF THE ROAD, AND THIS APPLICATION COULD ONLY BE MADE BY SALES OF THE LAND PENDING CONSTRUCTION. IT WAS SUPPOSED AND INTENDED THAT "ACTUAL SETTLERS" WOULD APPLY TO PURCHASE, AND THAT THE COMPANY WOULD SELL TO SUCH APPLICANTS ALL THESE LANDS BEFORE SUCH CONSTRUCTION SHOULD BE COMPLETED. ONLY IN THAT WAY COULD THE ROAD BE BUILT. IT FOLLOWS, THEREFORE, AS A NECESSARY COROLLARY TO THIS PRIMARY PURPOSE AND INTENTION OF CONGRESS, THAT IF FOR ANY REASON "ACTUAL SETTLERS" DID NOT APPLY TO PURCHASE THESE LANDS, AND IF THEY WERE NOT SOLD BY OR BEFORE THE FINAL COMPLETION OF THE ROAD AND THE ACCEPTANCE OF SUCH COMPLETION BY THE UNITED STATES AS IN PERFORMANCE OF THE GRANT, THEN AND THEREAFTER THE "ACTUAL SETTLER" CLAUSE WOULD BECOME INOPERATIVE, AND WHETHER THE WORDS OF THE "ACTUAL SETTLER" CLAUSE CREATED A COVENANT OR CONDITION, THE ESTATE OF THE COMPANY IN THE LANDS UNSOLD WOULD BECOME ABSOLUTE AND UNCONDITIONAL. IT IS NOWHERE CLAIMED BY THE UNITED STATES THAT ANY LANDS WERE SOLD IN VIOLATION OF THIS CLAUSE PRIOR TO THE COMPLETION AND ACCEPTANCE OF THE ROAD, AND NO BREACH ON ACCOUNT OF ANY SUCH SALE IS ASSIGNED.

The fact that no provision is made for the payment of taxes which may be assessed upon these lands, as belonging to the grantee companies, shows that the

“actual settler” was such person as may have been upon the land when the grant was made, or as may have entered upon the land as such prior to completion and acceptance of the road, and issuance of patent by direction of the President, for the lands opposite to and coterminous with the constructed portion of the road. It shows that the title to the lands thus occupied or applied for by the “actual settler” prior to issuance of patent, was regarded as public land, as to assessment and taxation, and that until such patent issued, or the President had directed its issuance, the grant was held in trust for such “actual settler,” and that jurisdiction existed over such “actual settler” who could establish his settlement, residence, and cultivation, and the fact that he was a bona fide “actual settler.” Under such circumstances the land thus applied for and occupied by such “actual settler” was quasi public land, and as such not subject to assessment and taxation, and hence the statute made no provision for payment of any sum other than the flat double minimum price of \$2.50 per acre.

The taxes paid from April 1st, 1870, to April 30th, 1911, were \$1,827,234.10, and from April 30th, 1911 to April 30th, 1914, \$930,859.97, a total of \$2,758,094.07.

The views above indicated in substance were presented by the European & Oregon Land Company and the Oregon & California Railroad Company in a letter of transmittal from the European & Oregon Land Company of date January 27, 1872, addressed to Attorney General Williams (see Government's Exhibits 109, 109-a, 109-b, 109-c and 109-d, Transcript Vol. X, pages 5322-5370).

Therewith was submitted the original opinion of Samuel M. Wilson, of San Francisco, California, bearing date November 11, 1871. It must be borne in mind also that at that time the Supreme Court had not had occasion to construe the rights of actual settlers,—present or potential—under the reservations contained in these acts, nor had the Land Department definitely ruled at what time the right of the company under these grants attached as against actual or potential settlers.

In *Oregon Central Railway Company v. Jones*, 14 Land Decisions, 283, 284, Secretary Noble discussing this subject, says:

“Your decision (meaning the Commissioner of the General Land Office) states that:

“‘Previous to 1886 it had been held that the right under the grant attached at the date of approval thereof, but by Commissioner’s decision of February 6, of that year, in the case of Alfred F. Sears against the company, it was held that the grant was a float and attached to no particular tract until the definite location of the road, and that the tract involved having at that date been covered by a homestead entry, was excepted from the operation of the act.’

“The contention on the part of the company is, in effect, that the right under this grant attached upon the passage of the act; that all lands then free from valid adverse right passed, and that thereafter no rights could be acquired, as against the grant, by settlement upon and entry of the lands.

“It is true that the act recites that the road was in process of construction at the date of its passage, but, aside from the termini, there is nothing to give location to the road.



"The grant was therefore in the nature of a float, until location was made, for, until that act was performed, the lands passing under the grant were incapable of identification.

"It is clear that the act itself did not reserve any lands prior to the definite location of the road, for by the second section of the act it is provided that

Whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands."

It will thus be seen that prior to 1886 the Land Department had ruled that the right of the company under the grant attached at the date of the approval of the act. That is to say,—from July 25, 1866, as to the East Side grant, and from May 4, 1870, as to the West Side grant, but on February 6, 1886, in the case of *Sears v. Company*, it was held that the grant did not attach to any particular tract until the definite location of the road, and that a tract covered by homestead entry at that time was excepted from the operation of the act. Therefore, on April 10, 1869, and May 4, 1870, it must be understood that the rights of actual settlers, that is, settlers upon the land prior to the definite location or survey of the line of road and the filing of a map showing the same, or prior to construction of road and acceptance of same by the President, and direction to issue patents therefor, had not been settled or defined. There was no settled construction of the right of either

the actual or potential settler. In this situation, Mr. Wilson in his letter, says:

“The power of the Companies over the land is left entirely unrestricted, as it must have been to enable them to use the land for the practical purposes indicated. The Companies were put upon limited time, in the construction of their work. The first section of twenty miles was required to be finished in two years, and at least twenty miles was required each succeeding year, and the whole by the 1st July, 1875. The best mode of obtaining aid, and funds out of the lands, with which to do the work, is left entirely to the good sense, sagacity and business judgment of the Companies. The entire *jus disponendi* was given to the Companies in the most unrestricted manner. In fact the disposition of these lands by the Companies was greatly facilitated by the Government, for a restraint of alienation is placed on the alternate sections remaining in the Government; the price being fixed at double the minimum price of public lands when sold; whilst the Companies might sell at any price, however low. The Government thus placed itself intentionally in a position where it could not compete with the Companies. The latter could get up great auction sales, could invite immigration by low prices, could mortgage, lease, or otherwise dispose of the land, as they might see fit. \* \* \*

“We now come to the Act of April 10th, 1869, and must read it not only in view of the Act of 1866, but in the ‘light of surrounding circumstances.’ We must, therefore, remember that at the time of the passage of the Act of 1866, there was no company in Oregon, selected by Congress, as the recipient of the powers and privileges con-

ferred. *That* matter was referred to the sovereign State of Oregon. The Legislature of that State was left to designate a Company. No such designation was made until Oct. 20th 1868. The Legislature could hardly be charged with neglect. On the contrary, the delay must be attributed to a due regard to the public interests. The Company designated, could be guilty of no neglect, because it could not act until designated. Congress might withdraw its bounty, or change its policy, doubtless, but unless it very clearly indicated that intention, a waiver as to mere points of time, would be assumed, where a Company had acted with all due celerity after its designation. The Federal Government, consistently with comity and public policy, could not treat a Sovereign State with disrespect, and therefore would not inflict a penalty on the Corporation, because of delay in the action of the State itself.

“The Act of 1869 gives the Company that had been designated by the Legislature of Oregon, the right to file its assent within one year after the Act of 1869, and gives to that filing the same force and effect, to all intents and purposes, as if such assent had been filed within one year after the passage of said Act of 1866.

“There could have been no motive on the part of the Government, to put the Oregon Company, in a less favorable position than the California Company, for the latter, on reaching the State line, could have gone on, under the Act of 1866, with the consent of the Oregon Legislature, and completed the line of road to Portland. The same inducements on the part of the Government to give its aid in 1866, still exists in 1869. The Act of 1869, was, therefore, curative in its nature,



and waived the literal performance of the acts called for by the Statute of 1866. \* \* \*

“If it means that ‘actual settlers’ only’ can become purchasers from the Company, and that all the lands, far and near, whether at stations, new towns, or important commercial points, are limited to two dollars and a half per acre, then it not only is directly contrary to the whole scope and bearing of the Act of 1866, but repeals by implication, a great part of that Act. All this is done, if at all, not by the plain language of the body of the enactment, but by the obscure words of a second proviso. \* \* \*

“The times within which each twenty miles of road and telegraph shall be built, are not changed by the Act of 1869, and the most that can be said would be, that those periods of time, by reasonable construction would run from the date of the Act of 1869. The Sections 2, 4, 6, 8, and 9 of the original Act, must be considered still in force. The object is still ‘to aid in the construction of the Railroad, etc.’ The mandate still remains that ‘the land hereby granted shall be applied to the building of said road, etc.’ The word ‘assigns’ is still annexed to the word ‘Company.’ The great benefit the Government is to have, as secured by Sections 2 and 5, still remains intact. But if the last proviso to the Act of 1869 is to be read literally, most of those provisions of the Act of 1866 would be repealed by implication. The Company could no longer sell to the highest bidder, any of its vast acres, could have no auction sale, could not speedily realize, but must await the slow and tedious progress of immigration to an agricultural State. At least a quarter of a century would pass away, yet short and positive is the time within which the road is to be completed and equipped.

“The Secretary of the Interior too, withdraws the Railroad lands from public sale and settlement, as provided in Section 2 of the Act of 1866, and thereafter no *bona fide* settlement could be made on these lands. The Company could not even Mortgage the lands, because a mortgage always contemplates the possibility of a foreclosure, or other enforced payment, in the ordinary way of judicial sentence, with the right of purchase by the creditors. Yet if none could purchase but settlers, and they only to the extent of 160 acres, each, and that too at two dollars and fifty cents per acre, a mortgage is practically and in fact, absolutely prohibited. Such absurd results could never have been contemplated by Congress; certainly not as the effect of a mere proviso to an amendatory or supplemental Act.

“Take the language of the *proviso* itself, and what can be said of it? Does it mean that no sale shall be made by the Companies, unless made to actual settlers? Is it merely a *power* to sell to actual settlers; or is it, at once, mandatory and limited? *Must* the Company sell to actual settlers against its inclination, and can it sell to no one else? If yes, how long must the ‘actual settler’ have been such? Can he claim the pre-emption right the next day after he enters? If not, how long must he have occupied before he can claim it? What kind of occupation is required to make him an actual settler? Will the pitching of a tent do? Or must he have a house? Are enclosures necessary? Must he conform in his settlement to the Government survey, or not? Who is to determine his qualifications as an actual settler? Not the Registers, or any other Government officer, for these cease to be Government lands, and pass to the Company, and the restraint at

best, is on the power of alienation, after the lands vest in the patentee. Is the question then to be tried between the 'actual settler' and the Company? Can the 'actual settler' tender his money and claim a deed, and procure a decree of a Court of Equity, enforcing his rights; or a mandamus? If so, the Government would no longer have any interest in the controversy, and the Courts of the land would give a complete remedy to the settler. If the land were sold by the Company before the settler entered, could he have a right for all time, still to enter, until somebody should become a settler? Can it be that these lands are to remain forever out of market unless some one settles on them? In twenty years from now, will a title traced back through a series of persons to the patentee be conclusive; or must it appear, that the first person claiming from the patentee, was an 'actual settler'? \* \* \*

"Grammatically considered, the word 'only' would be an adjective, qualifying the noun 'settlers', and the meaning would be, that sales shall be made to none others than 'actual settlers'; which would leave the company at liberty to keep its lands forever out of the market, use them itself, or lease them for such terms as it pleases.

"Besides, this reading, as above shown, is in conflict with the whole scope and object of the Act of 1866, and would repeal by implication, some of its most important and necessary parts.

"If the words be transposed, and the word 'only' be placed in proximity to the words 'shall be sold,' it would be an adverb, and leave the Company at liberty to do as it pleases with the lands, unless in the case of an actual settler, with whom its transactions would be limited to *sales only*. This construction, of course, is not admissible.



"It would be equally absurd to suppose that no actual settler could, where the Company is willing, buy one quarter section 'only'; thus attaching the word 'only' to the quantity named in the proviso.

"All these constructions seem to be so unreasonable, that I have been led to seek for some other meaning to this proviso." \* \* \*

"Looking then, at the Act of April 10th, 1869, and we find that although the Company designated by the Legislature of Oregon, is given one year after April 10th, 1869, within which to file its assent in the Department of the Interior, yet that Act relates back, and has the same effect as if filed before the 25th July 1867. Being therefore retro-active, Congress was cautious to prevent a wrong being inflicted upon persons whose rights had intervened during this time. The first proviso distinctly reserves the intervening rights of Railroad Companies under the Act of 1866, and provides (what was intended by the original Act) that only one Oregon Company should have a grant of lands under those Acts.

"The second proviso carries out the same principle. During the long lapse from July 25th 1866, the date of the first Act, and April 10th 1869, the passage of the last Act—settlers had gone in upon portions of these lands, and made their homes, though they had not yet purchased, or pre-empted, or complied with the homestead laws. They were, however, 'actual settlers,' and might have become, in the process of time (had not the Act of 1869 been passed), entitled to pre-emption or homestead rights. Up to April 10th 1869 no Oregon Company had acquired any right under the Act of 1866; consequently the Secretary of the Interior had not withdrawn, under the Act, the

land from market, or settlement. The Act of 1869 operating then retrospectively, these 'actual settlers' were affected, and consequently were intended to be protected by the last proviso of the Act. Rejecting the single word 'only,' and the proviso becomes plain, viz: '*And provided further, That the lands granted by the Act aforesaid shall be sold to actual settlers, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*' This would mean 'actual settlers,' at the date of the Act of 1869—or possibly up to the time of the location of the road, after the passage of the Act of 1869.

"The difficulty arises entirely from the use of the word 'only.' But the proviso may, by a slight transposition, give force even to that word; thus making it, that in the case of actual settlers, and in their cases 'only,' the Company would be compelled to let them have a quarter section each, at two dollars and a half per acre. This construction is rational and practical, retains all that is useful, in the original Act, aids the Railroad Company, and yet does justice to the 'actual settler' who was on the land when the Act of 1869 was passed. \* \* \*

"In thus construing the Act of 1869, it is made to perform only a similar to that of the proviso in Section 2 of the Act of 1866. That Section after declaring that the 'land which shall remain in the United States, within the limits of the aforesaid grant, shall not be sold for less than double the minimum price of public land, when sold,' goes on to protect by the proviso '*bona fide and actual settlers*' under the pre-emption laws of the United States, giving the right to purchase, at the price fixed at the date of their settlements, and also to

protect settlers under the homestead laws, to the extent of eighty acres of the land reserved to the United States.

“The manifest intention of the last proviso, to the Act of 1869 is likewise to protect the ‘actual settler’ who is deemed to have a claim on the equity and conscience of the Government.

“I am satisfied from the whole scope of both Acts of Congress, and by applying the recognized rules of construction, that the meaning of the proviso, of the Act of 1869 is what I have given above, and that the power of the Company to sell is unlimited, as to persons and price, except that actual settlers on the lands on the 10th April 1869 and possibly up to the time of the location of the line of the Railroad, have the right to purchase one quarter section each at two dollars and fifty cents per acre.”

It is true that the Secretary of the Interior disagreed with the company in this construction of these acts but no affirmative action was ever taken by the United States upon the matter, and the United States, with a copy of the trust deed of June 15, 1870, under which the construction funds for the first 198 miles were raised, and with a copy of the deed from the Oregon and California Railroad Company to the European & Oregon Land Company on file in connection with this correspondence, and having notice of the construction of the act by the companies, acquiesced therein from that date down to April 30, 1908, and permitted the company to mortgage these lands, raise money upon which to construct the road, and to sell the lands in harmony with the views expressed in this correspond-



ence. This was contemporaneous and practical construction of the act, acquiesced in, after 36 years, by the United States; but independently of any question of estoppel or waiver, and where the rights of the parties have vested, as here, the rule is well settled that such construction will be followed by the courts.

11 Enc. of U. S. Sup. Ct. Rep., 136, 137, 138, 139, 140, and cases cited.

N. P. R. Co. v. U. S., 36 Fed. 282

Brown v. U. S., 113 U. S. 570

Opinion of Attorney-General Garland, 8 L. D. 13

U. S. v. Railway Co., 98 U. S. 341

U. S. v. Philbrick, 120 U. S. 58

U. S. v. Graham, 110 U. S. 219

Robertson v. Downing, 127 U. S. 607

Pennoyer v. McConnaughy, 140 U. S. 1

It will be noted also that, as shown by the testimony of Mr. Loring, (volume 4, page 372) the company in the early days kept a book called a "railroad pre-emption book," the purpose of which was to record or note the cases where settlers had entered upon the lands supposing or believing they were public lands, or had entered upon the lands before the company's title had become final, whether because of going upon the lands before they were surveyed or in advance of construction of line or in advance of the filing of map of definite location or prior to the acceptance of the constructed line and the issuance of patents, does not appear.

The Act of July 25, 1866, contains in Section 2 thereof, an express provision that—

"when any of the said alternate sections or parts

of sections shall have been found to have been granted, sold, reserved or occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, \* \* \* shall be selected by said companies in lieu thereof."

After providing that the even sections within the limits of the grant shall not be sold for less than double the minimum price of public lands, there is a further proviso, "that bona fide and *actual settlers* under the pre-emption laws of the United States may, after due proof of settlement, improvement and cultivation, as now provided by law, purchase the same at the price fixed for said lands, at the date of such settlement, improvement and cultivation." There was a further proviso that "settlers under the provisions of the Homestead Act, who comply with the terms and requirements of said Act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States; anything in this Act to the contrary notwithstanding."

The words "occupied by homestead settlers," the words "actual settlers under the pre-emption laws," and the words "settlers under the provisions of the Homestead Act," cannot mean the same class of persons in the same situation. It would seem that the term "actual settlers" under the pre-emption laws of the United States contemplate that class of persons who were upon the even sections at the time the rights of the Railroad Company became definite and fixed under the Act, or who were actual settlers under the

pre-emption laws of the United States at some time prior to the issuance of patents. The term apparently is limited to such settlers upon the even sections as were actually upon the lands, and to a class of settlers who were claiming under the pre-emption laws. Another class of settlers, to-wit, those taking under the provisions of the Homestead Act, and who were not defined by the term "actual settlers," who might diminish the quantity of lands going to the Railroad Company, were limited to eighty acres of land in the even sections. There were then three classes of settlers contemplated by Section 2—(1) Homestead settlers or pre-emption claimants occupying portions of the odd sections, which class evidently is limited to those who had entries in the local land offices prior to the time the rights of the Railroad Company attached, whenever that was; (2) Actual settlers under the pre-emption laws. That is, a class of persons who had entered upon the even sections desiring to take under the pre-emption laws but who had filed no declaration of their intention to take under the pre-emption laws prior to July 25, 1866, or prior to the time when the rights of the company became officially known. These were actual settlers as contradistinguished to potential settlers and were limited to such as were there under the pre-emption laws or who might declare their intention to take under the pre-emption laws, based upon their actual settlement; (3) Settlers under the provisions of the Homestead Act, who were evidently potential or future settlers, who were limited to eighty acres and who might enter such area under the Homestead Act after



the rights of the Railroad Company had become definitely fixed and ascertained.

In this situation Congress passed the Act of April 10, 1869, (16 Stat. 47) and used this language, "And provided further, that the lands granted by the Act aforesaid shall be sold to *actual settlers only* in quantities not greater than a quarter section to one purchaser, and for a price not exceeding \$2.50 per acre."

On May 4, 1870, (16 Stat. 94) Congress passed the act making a grant of lands to the West Side Company. In Section 1 of that act the grant is made "to the amount of ten such alternate sections per mile on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act." That is to say,—if there was in the local land office a valid pre-emption or homestead right prior to May 4, 1870, although within an odd section within the limits of the grant, such right was protected, and the land covered thereby did not pass to the company. The date of the passage of the act and the record in the land office fixed the rights of the parties as to that class of settlement or entry.

It must be borne in mind that this railroad was in process of construction at the time the act was passed, but in order that the Land Department might know the extent of the lands affected by the grant, Section 2 required that the company should file with the Secretary of the Interior, maps of the survey and location of twenty or more miles of road, and whenever and as

often as this was done, the Secretary was required to cause the granted lands adjacent and co-terminous therewith to be segregated from the public lands and "thereafter the remaining public lands subject to sale, within the limits of said grant, shall be disposed of only to actual settlers, at double the minimum price for such lands," but with the proviso that "settlers under the provisions of the Homestead Act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres of said ungranted lands; anything in this act to the contrary notwithstanding." Reading these provisions of the act together, and giving all the words used, full meaning, it appears that there are at least three classes of settlers entitled to protection under the terms of the act; (1) Pre-emption or homestead claimants, whose entries are of record in the local land office, affecting lands within the odd sections, prior to May 4, 1870; (2) Lands within the even sections, after survey of definite location has been filed with the Secretary of the Interior, which must be disposed of only to actual settlers at double the minimum price of such lands, the actual settlers there contemplated evidently referring to those who have settled or who may have settled under the pre-emption law but have filed no declaration to that effect in the local land office prior to the filing of this map of definite location; (3) Homestead settlers who may desire to enter the even sections after the filing of this map of definite location and who are limited to eighty acres. In this situation Section 4 provides,

“that the said alternate sections of land granted by this act, except only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding \$2.50 per acre.” Here, for the second time in this act, the words “only to actual settlers” are used. These words must be given a definite and certain meaning, they presumably characterizing and defining the same class of persons named in Section 2 of the act, who were entitled to purchase as actual settlers, at double the minimum price for such lands, such of the even sections as they were then upon, under the pre-emption act, when the map of survey was filed. That is to say, Congress intended that the actual settlers protected by Section 2 might acquire the lands occupied by them under the pre-emption act, where, for any reason, such persons were upon the lands prior to the time the map of definite location was filed, but the remainder of the public lands within the even sections were to be taken under the Homestead Act and limited to eighty acres. There was no reason why the homestead claimant should be limited to eighty acres and permitted to commute his entry at \$2.50 an acre within fourteen months after settlement, if, at the same time, 160 acres could be entered under the pre-emption law at \$2.50 an acre within twelve months after filing the declaration.



Bearing in mind, therefore, that these words "only to actual settlers" are limited to a particular class of persons in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, we proceed to a discussion of the meaning of the term "actual settlers."

Black's Law Dictionary, second edition, page 1080, defines the term "settler" as follows:

"A person who, for the purpose of acquiring a pre-emption right, has gone upon the land in question and is actually resident there."

The author cites the following cases:

Hume v. Gracy, 86 Tex. 671.

Davis v. Young, 2 Dana (Ky.) 299.

McIntyre v. Sherwood, 82 Cal. 139.

Black's Law Dictionary, second edition, page 28, defines the term "actual" as follows:

"Real; substantial; existing presently in act, having a valid objective existence, as opposed to that which is merely theoretical or possible; something real, in opposition to constructive or speculative; something existing in act."

and cites the following cases:

Astor v. Merritt, 111 U. S. 202.

Kelly v. Ben. Ass'n, 46 App. Div. 79.

State v. Wells, 31 Conn. 213.

Webster's New International Dictionary defines the term "actual" as follows:

"Involving or comprising action; pertaining to or consisting of acts or actions; active; existing in

act or reality; really acted, or acting or being; in fact; real; opposed to potential, possible or nominal; non-action at the time of; now existing; present.

The Standard Dictionary defines the term "actual" as follows:

"Real in being or act; carried out or realized in practice; existing in fact, as opposed to merely possible, constructive, conceivable or ideal.

"(Law) Existing in fact; real as distinguished from conjectural or imputed by construction; as actual possession; actual notice; actual damages;

"Being in existence or action now; existent; present; as the actual state of the country is cheering."

The Century Dictionary defines the term "actual" as follows:

"Active; practical; in full existence; real; denoting that which not merely can be but is; opposed to potential, apparent, constructive and imaginary; now existing; present; opposed to past and future; as in the actual condition of affairs."

Bearing in mind these definitions and also bearing in mind that the term "actual settlers" is nowhere used in the pre-emption act or in the Homestead Act, it is proper and necessary that the term "actual settlers" shall have a definite and certain meaning and that each word should be given its true legal significance.

This distinction is recognized by Assistant Secretary Pierce in his opinion addressed to the Commissioner of the General Land Office, August 31, 1909, in the case

of *Adams v. Coates*, 38 Land Decisions 179, 180. We quote—

“On December 14, 1892 (Sen. Ex. Doc., 52d Cong. Vol. III, No. 39), Congress was advised by the Secretary of the Interior that lands within the Siletz Reservation were ‘mostly mountainous and densely timbered with good fir and cedar trees and well watered with rapid running streams which will furnish a good means of getting timber out.’”

“The Act of August 15, 1894 (28 Stat. 323, 326) opened lands in that reservation to homestead entry, and required—

final proof to be made within five years from the date of entry, and three years’ actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

“It is to be noted that, while the residence required by the act above quoted is reduced to three years, its character is particularly prescribed—it must be ‘actual.’ This term is new to Federal legislation concerning proceedings to acquire title to public lands, and it must be presumed that Congress used the same advisedly. The language of the statute being plain and unequivocal, leaving no room for construction, an apt and sensible meaning must be given thereto, it being inadmissible to either import anything into it or eliminate anything therefrom in order to change or modify its plain intent.”

The Act of August 15, 1894 (28 Stat. 323, *supra*), was a special statute intended to apply to lands within the limits of the Siletz Indian Reservation, and as a prerequisite to patent, a homestead entryman was re-



quired to show that he had maintained an actual residence upon the land for a period of three years. The term "actual" therefore became important. It was believed that when used in connection with the word "settlers" the law intended to give the word a different meaning from that which would be applied from the use of the word "settlers" alone.

In *Johnson v. Squires*, 55 Cal. 103, 104, the court had occasion to construe "An Act for the relief of purchasers of state lands," under Section 3 of Article XVII of the Constitution, which provided that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers." The court in that case says:

"The application of plaintiff, we may assume, complied in form and substance with the law in existence when it was made. Yet we cannot determine that he is entitled to purchase, in view of the prohibitory provision of the Constitution: 'Lands belonging to this State, which are suitable for cultivation, shall be granted only to actual settlers.' (Art. XVII, Sec. 3.)

"This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase money, nor has his proposition to buy been accepted by the agent of the State. He has parted with nothing of value, and can neither assert that the State Constitution has 'impaired the obligation' of a contract, or deprived him of property 'without due process of law.' It is admitted by the stipulation—constituting part of the findings—

‘At the date of the application of Squires (defendant and respondent) neither plaintiff, nor any one under whom he claims, was in possession of said land or any part thereof.’ It does not appear from the record, however, whether either party has been in possession since January 1st, 1880. This could not appear, since the judgment of the District Court was rendered prior to that date. Nevertheless, we must declare that the land can be granted only to actual settlers. Whether the land could be granted to an actual settler who had been wrongfully dispossessed, need not now be decided. We only say that under the present Constitution the facts as to the possession of the respective parties must be ‘found’ in all contested cases like the present.”

That is to say, the party must have been an actual settler of the land before he was intending to purchase, but his application to purchase could be made before as well as after the Constitution took effect. That is to say, if an application was made by an actual settler to purchase this class of lands, such application, although made before the Constitution took effect, was protected. After the constitution took effect, applications to purchase could be made, but the party at the time of the application must be an actual settler. This shows that the Legislature intended by the use of the word “actual” an added meaning that would not obtain by the use of the word “settler.” It clearly meant an actual settler or one who was a settler at the time, rather than a potential or prospective or possible settler.

In *Urton v. Wilson*, 65 Cal. 11, the court says:

“For the purposes of the controversy between the plaintiff and defendant, it is necessary only to say that plaintiff has no right to purchase the land. Section 3, Article XVII, of the Constitution of this State, declares: ‘Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law.’ The plaintiff was not an actual settler. It is true, he made his application before the Constitution was adopted, but he thereby acquired no rights which the State could not annul; he had

paid nothing. This question was directly considered and passed on in *Johnson v. Squires*, 55 Cal. 103. So long as the statute remained in force, the plaintiff’s application might have been entitled to be considered, if defendant’s application was void; but when the statute was modified by the Constitution, he was obliged to bring himself within the constitutional provision. We note, as referring, in principle, to the plaintiff’s case, what is said by the court (by Sawyer, C. J.), in *Hutton v. Frisbie*, 37 Cal. on pp. 490-498, regarding pre-emption laws and the effect of their repeal.”

In *Dillon v. Saloude*, 68 Cal. 267, the Court says:

“It is not denied that appellant’s application was in all respects proper and sufficient at the time it was made, but it is claimed that after the adoption of the new constitution in 1879, and the amendment of Section 3495 of the Political Code, on the 28th of April, 1880, the land could only be sold to an actual settler thereon, and that as ap-



pellant's answer failed to state that he was an actual settler on the land, it was wholly insufficient.

"In support of this view counsel for respondent cites *Johnson v. Squires*, 55 Cal. 103, and *Urton v. Wilson*, 65 Cal. 11.

"The constitution provides that 'lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers.' (Art. 17, Sec. 3.)

"This prohibited and made unlawful the sale of any land belonging to the state, which was suitable for cultivation, to one who was not an actual settler thereon, even though his application to purchase it was made before the constitution was adopted, and when settlement was not required. But it did not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application."

In *Gavitt v. Mohr*, 68 Cal. 506, the court says:

"Section 3 of Article 17 of the Constitution declares:

" 'Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law.' And section 3495 of the Political Code, after prescribing the conditions and terms for purchasing cultivable land from the state, provides that an applicant, to purchase, must make and file an affidavit in the office of the surveyor-general of the state, setting forth the qualifications of the applicant, the character and condition of the land which he wants to purchase, whether the land is

or is not suitable for cultivation, and if it is, that the applicant is an actual settler thereon. Under the law, therefore, a claimant, to purchase from the state a tract of its cultivable land, must be, at the time of filing his application, an actual settler.

“An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state. For that purpose, an actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice to all the world of the right.”

In *Bratton v. Cross*, 22 Kan. 469, the court had occasion to construe a statute of the state concerning the sale of its school lands, where the words “actual settlers” were used. Mr. Justice Valentine, speaking for the court in that case, says:

“The only question which we think we are called upon to decide is whether, under the laws of Kansas, actual residence is required to enable a person to purchase, to the exclusion of others, a particular piece of the school lands of the state. The decision of this question depends entirely upon the construction that may be given to sections 4, 5, 6, and 20 of Article 14, c. 122, Laws 1876, (Comp. Laws 1879, pp. 854, 857, Sections 195-197, 211). Under said sections only per-

sons who have 'settled upon and improved,' or who are 'actual settlers' upon, such lands, can so purchase them to the exclusion of others.

"Sections 4, 5, and 6 use the words 'settled upon and improved,' while section 20 uses the words 'actual settlers.' To 'settle' upon land, we think, means to fix one's place of residence thereon; and a 'settler' upon land is one who resides thereon. This is in accordance with all the definitions of the words 'settle,' 'settler,' and 'settlement,' when applied to settlements upon land. See any of the dictionaries, and also *Smith v. Beck*, 25 Pa. St. 106; *Burleson v. Durham*, 46 Tex. 152; *Wilson v. McLernan*, 20 Iowa 30, 33; *Munday v. Muse*, 15 La. Ann. 237; *Gilday v. Watson*, 5 Serg. & R. 267; *Clemmins v. Gottshall*, 4 Yeates 330; *McLaughlin v. Maybury*, Id. 534.

"A person who has done nothing more than to make improvements on the land cannot, under sections 4, 5, and 6, purchase the same. He must also have settled upon the land. In the language of these sections, he must have 'settled upon and improved' the land. Both are necessary. Probably a person might, by going upon school land, and making improvements thereon, with a bona fide intention of becoming a settler thereon, obtain rights thereto which would date from the very first moment of his occupancy; but he evidently could not purchase the land as an exclusive purchaser until he had completed his settlement. If he did not go upon the land with the intention of becoming a settler, (and that seems to be this case) evidently he would not obtain any rights thereto or thereon. A person residing in New York, or anywhere else in the world, might take possession, and actual possession, of school lands of Kansas,



and possession not only of one piece, but of many pieces, and might make improvements on all of such pieces; but we would not think that he would thereby become a settler upon all of such pieces, or indeed upon any one of them, or that he would thereby get the exclusive right to purchase the same; nor would we think that he would obtain any exclusive rights in or to any of them. But according to the theory of the plaintiff in the court below, he would obtain the exclusive right to purchase every one of them. Where the plaintiff in the present case resides, the record does not show, and we are not informed.

“Section 20, above referred to, after providing for the purchase of school lands by ‘actual settlers,’ then contains a proviso ‘that the person so residing upon said school lands’ (evidently referring to ‘actual settlers’) ‘shall have the privilege of purchasing said land, exclusive of the appraised value of the improvements.’ Evidently the words ‘actual settlers’ as here used, mean actual residents.”

In *Baker v. Millman*, 77 Tex. 46, the court says:

“It may be, as claimed by counsel for appellee, that it was not necessary that he should be the head of a family in order to acquire a right of pre-emption in the land claimed by him. The provision of the Constitution in question, in designating the persons to be protected, does not say heads of families; nor does it use any other words which evince an intention that the right should be restricted to that class; but the language is, ‘Actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent,’ etc. Const., Art. 7, Sec. 6. While this

language does not exclude single men, it includes only such persons as have actually settled upon the land and are residing upon it at the time the county determines to sell.

“An actual settler upon land is one who has actually established his residence upon it, and not one who has enclosed it and cultivated it, intending at some future time to live upon it. The use of the word ‘actual’ would seem to have been intended to prohibit the courts from extending the meaning of the word ‘settlers’ by construction, and to confine the benefits of the provisions to those only who come within the literal meaning of the term. The purpose was to secure to those who had made or should make homes upon the school lands an opportunity to make them permanent by purchase of the lands upon which their residences were established. It was not the object to confer any privilege upon those who should enclose and use the lands while they resided elsewhere. The defendant was not residing upon the lands at the time they were sold, and cannot be deemed an ‘actual settler’ within the meaning of the Constitution.”

In *Astor v. Merritt*, 111 U. S. 202, 213, the Supreme Court of the United States had occasion to construe the words “wearing apparel not actually used,” and Mr. Justice Blatchford, speaking for the court, says:

“The word ‘actual’ in the lexicon, has as a meaning ‘real,’ as opposed to ‘nominal,’ as well as the meaning of ‘present.’ ‘In use’ is defined to be ‘in employment;’ ‘out of use,’ to be ‘not in employment;’ ‘to make use of, to put to use’ to be ‘to employ, to derive service from.’ ”

In *Osborne v. San Diego Company*, 178 U. S. 22, 38, Mr. Justice McKenna says:

“ ‘Actual’ of course, means existent, but it does not preclude change.”

The language thus used was applied in construing the words of a charter of a Water Company, fixing the rates, the contention being that the rates were unalterable under a clause which provided that “until such rates shall be so established” the actual rates established should be deemed and accepted as the legally established rates.

It is therefore important to determine what was meant by the use of the words “actual settlers only,” and if we are to adopt the classification of entrymen, as we have suggested, and the reasoning of the courts, as well as the definitions of the lexicographers, it seems to us clear that by the term “actual settlers only” is necessarily meant that class of preferred purchasers who entered upon these lands before they were surveyed or in advance of construction, and at some time before the finding of the Land Department that the company had earned the particular lands and was entitled to a patent therefor. That period was the date when the Secretary of the Interior, acting under the statute, submitted the reports of the Commissioners appointed to inspect and examine the completed portions of the road, to the President of the United States, who in turn approved these reports and directed the Secretary to issue patents to the company for the lands thus earned.



Unless it shall be held that the actual settlers contemplated by the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, are such persons as availed themselves of the pre-emption act while it was in force, no particular time or term of residence before purchase from the company is required. Construed, as suggested by us, the actual settler clauses of these acts did not contemplate any definite term of residence or any lapse of time before the settler could buy. It was expected that the company would deal with the actual settler as a pre-emption claimant and subject to the same rules and restrictions as to entry and settlement as applied to pre-emption settlers, or else that it would, at its own hazard, sell to a person representing himself to be an actual settler, and convey immediately upon tender of the \$2.50 per acre. If the term "actual settler" be construed to mean one upon the land when the title of the company became absolute by construction of road and issuance of patent, there would be no question, after construction of road and its acceptance, but that the act could be held applicable to so-called actual settlers. A late comer, such as one of the class of cross complainants or interveners, nearly 25 years after the final completion of the road, could not relate himself to the actual settler clause because not contemplated by the act, and if such actual settler should be construed to be a potential or possible settler, then after the repeal of the pre-emption law, effected on March 3, 1891, (26 Stat. 1097) the company would, of course, be no longer obligated to sell, because no settler, within the meaning of the act, could apply or show his right to buy.

In *McDonald v. Union Pacific R. Co.*, 70 Neb. 346, the court, construing the Act of July 1, 1862, (12 Stat. 489) which contains the proviso that "all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company," says:

"It is our opinion that the above mentioned reservation in the proviso of section 3 of the act of 1862, had sole reference to the purchase of public lands by preemption and that it was therefore, as respects the privileges of the public and of citizens, wholly repealed by the act of March 3, 1891; but, for the purpose of restricting the discussion to as narrow limits as possible, we have preferred to treat it, as does the plaintiff, as including the privilege of settlement and acquisition under the homestead laws. As already said, it is quite clear that the defendant has no duty to perform and no authority to exercise under these latter laws, the administration of which is committed solely to a governmental department created by congress. Hence, when the plaintiff tendered his money to the defendant and demanded from it a conveyance of the land in controversy, he required of the latter an act which it was not only under no obligation to perform but the doing of which, if the lands are open to entry under the laws of congress, would have conferred no title or right of possession upon the plaintiff. But upholding the plaintiff's claim the courts would, in

practical effect, assume the administration of the public land laws, or, at least, the supervision of the administration of those laws by the department of the interior of the United States, a thing which even the federal courts are confessedly without jurisdiction to do."

There was no vested right in any actual settler designated in the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870, even if such settler could avail himself of the terms of the pre-emption act until he had tendered the purchase price and brought himself, by such tender and statutory qualifications as an actual settler, into relation with the particular tract of land. Prior to that time, even though the pre-emption law was in effect, the company could not in any view of the case, be obligated. Since its repeal such possibility of purchase and settlement is gone.

Hutton v. Frisbie, 37 Cal. 475, 481, 490, 491.

The company, assuming that the pre-emption act was in effect as to these lands, stood in the same position as the United States as to its lands.

Chief Justice Sawyer, in the case last cited, on this subject, says:

"No proprietary interest in the land, as against the United States, is acquired till payment. The parties embraced within the purview of the general pre-emption laws are simply authorized to enter the lands in preference to others, when the proper time comes, and the lands are thrown open for sale, on paying the purchase money in the mode



prescribed. It is a general law designating the order of preference to be given to parties desiring to purchase, and a rule for the guidance of the officers of the Land Department in the disposition of the public lands which they are not authorized to disregard without the authority of Congress. It is a mere privilege conferred, so far as the rights of the pre-emptioners are concerned, in case the lands should ever be offered for sale. But they may never be thrown upon the market. There is no right whatever given to have the lands ever open for sale. There is no contract between the pre-emptioner and the Government. There is no obligation on the part of the pre-emptioner to take the property, or of the Government to sell. The claimant may, at the last moment, abandon his pre-emption and locate another, or may decline to take any, and the Government cannot complain. There is no mutual obligation—none on either side. The Government is not bound to sell at all, until, in its discretion, it elects to do so. The statute simply designates the person who shall have the first privilege to enter while the statute remains in force, and when the land is thrown open to entry in the ordinary course of the sales of the public lands. The Government cannot be compelled to throw open the land for entry, or to permit an entry to be made, till in its own good time it sees fit to do so. The pre-emptioner has no contract obligation which he can in any way enforce. If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptioner, without payment, would have no right which he could enforce against the Government. He would have no action for damages, and could not compel

the issuing of a patent by mandamus. If a party goes upon the public land with a view to pre-emption, he does so knowing that it may never be sold. The Acts of Congress do not present the Government in the character of a party making executory contracts, but in the character of a Government which will, when it determines to sell its public lands, generally dispose of them in accordance with certain rules established by itself. We have no doubt that it is competent for Congress, at any time before the payment of the purchase money, to withdraw the land from sale, reserve it for its own use, or repeal all pre-emption laws, and take away any right of entry thereunder. The power exists. It is only a question of good faith and expediency. The right of pre-emption is a mere privilege, given for the time being, and, whatever the case may be with reference to other claimants, while the law is in force, not a right of property as against the Government, and it can be withdrawn at any time before it has been perfected into an obligation which can be enforced against the Government itself, and that is before a sale and payment."

The actual settler was preferred to a subsequent purchaser, and in the administration of the pre-emption law, if it was found that a tract of land was actually settled upon at the time, he was given a preferred right of entry.

In *Clements v. Warner*, 24 How. 394, 397, the court says:

"By the act of 1841, the pre-emption privilege in favor of actual settlers was extended over all the

public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers. No act of Congress has defined the meaning of the term reserve, as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they have been offered at public sale, are affected by the privilege of the actual settler to have the preference of entry. No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of Congress in favor of the actual settler is better accomplished by a restrictive rather than extensive interpretation of the exceptional clause in the act."

This construction is in harmony with the view expressed by Mr. Justice Harlan, who delivered the opinion of the court in *United States v. Oregon and California Railroad Company*, 176 U. S. 28, 47, where he says:

"No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption, private entry and sale pursuant to the filing by the railroad company of its map of general route. And the court should not construe the act as excluding lands in that condition, unless



it is prepared to hold that Congress had no power to confirm to the state lands which, at the time, were simply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the act of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a 'float' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated."

That language, it is true, would apply particularly to the Act of July 2, 1864, (16 Stat. 378) and the Homestead Act of May 20, 1862, (12 Stat. 392). See also *Leavenworth etc. Railroad Co. v. United States*, 92 U. S. 733, 748.

In the case last cited the court takes notice of the original practice by which lands affected by a grant were withdrawn as soon as made, but that such practice was changed.

Mr. Justice Davis, speaking for the court, in reference to the Act of March 3, 1863, (12 Stat. 772) says:

“The different parts harmonize with each other, and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and Congress was willing to aid her to build them, by a grant of a part of the national domain, in a condition at the time to be disposed of. It was accordingly made of alternate sections of land within ten miles on each side of the contemplated roads. Formerly, lands which would probably be affected by a grant were, as soon as it was made; if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these

ways, an equal number of odd sections nearest to those granted, and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it."

In *Northern Pacific Railway Co. v. Amacher*, 175 U. S. 564, 567, Mr. Justice Brewer, speaking for the court, says:

"The contest in this case is between one claiming under a homestead entry and a company claiming under a grant in aid of a railroad. It was long ago said by this court that 'the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person,' *Clements v. Warner*, 24 How. 394, 397; and in a later case, that 'the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon.' *Ard v. Brandon*, 156 U. S. 537, 543."

This illustrates and enforces the reasoning underlying the construction contended for by us. Congress had in mind a class of actual settlers who had entered upon these lands, who might otherwise be deprived of their improvements and of their right to take the lands under the homestead or pre-emption law, unless a preferred right of purchase was given to the actual settler up to the time when the rights of the company became fixed and definite by issuance of patent.



See also *Holmes v. United States*, 118 Fed. 995, 999, where Circuit Judge Gilbert, speaking for the Circuit Court of Appeals, Ninth Circuit, says.

“By the last of these exceptions it was contemplated that there might be a valid settlement of the public lands, other than those which were embraced in legal entries or covered by lawful filings, as those terms were used in the public land laws. Does the settler upon unsurveyed land, who makes it his home with the intention, as soon as the land is surveyed, to take the necessary steps to secure and protect his entry as a homestead, and to acquire title under the homestead law, and who makes valuable and permanent improvements on the land, make a ‘valid settlement pursuant to law?’ In *Clements v. Warner*, 24 How. 394-397, 16 L. Ed. 695, it was said:

“ ‘The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon.’

“In *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was said:

“ ‘A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase.’

“In *Railroad Co. v. Osborne*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, it was held that a settler upon public unsurveyed land, who had made improvements thereon with the intention of acquiring a title under the pre-emption laws as soon as the lands should be surveyed, had a ‘possessory claim’ such as was protected by the act of congress in granting to a railroad company a right of way

over the public lands, and conferring upon a territorial legislature power to 'provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned.' The court said:

" 'It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.' "

In *Southern Pacific Railroad Co. v. Bell*, 183 U. S. 675, 679, the court says:

"The relative rights of railroads and settlers under these Congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in *Hewitt v. Schultz*, 180 U. S. 139, the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within

its granted limits, by reason of the fact that they have been otherwise disposed of prior to the designation of the line of the road.”

In *Kansas Pacific Railroad Co. v. Dunmeyer*, 113 U. S. 629, 638, Mr. Justice Miller, speaking for the court in a case which is or may be considered a landmark in land-grant law, says:

“It will be observed that by the act of 1862, upon the filing of the company’s map of designation of its general route, the Secretary was required to withdraw the lands within fifteen miles of said designated route from ‘pre-emption, private entry, and sale.’ In the terminology of the laws concerning the disposition of the public lands of the United States, each of these words has a distinct and well-known meaning in regard to the mode of acquiring rights in these lands. This is plainly to be seen in the statutes we are construing. In the third section or granting clause there are excepted from the grant all lands which at the time the definite location of the road is fixed had been sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim had attached. Here sale, pre-emption, and homestead claims are mentioned as three different modes of acquiring an interest in the public lands, which is to be respected when the road becomes located, and the words are clearly used because they were thought to be necessary. But a sale for money in hand, by an entry made by the party buying, is throughout the whole body of laws for disposing of the public lands understood to mean a different thing from the establishment of a pre-emption or homestead right where the party



sets up a claim to a definite piece of land, and is bound to build on it, make fences, cultivate and reside on it for a period of time prescribed by law."

This clearly recognizes the classes of entry and the classes of persons entitled to enter, and is in harmony with the views that we have suggested, that the words "actual settlers only" had reference to a distinct and well-understood class.

Judicial opinion as to the effect of the clause in the Act of July 1, 1862 (12 Stat. 489), granting lands to the Union Pacific Railroad Company, which provided that the lands thereby granted, which should not be sold or disposed of by the company within three years after the entire road shall have been completed, should be subject to settlement and pre-emption like other lands, at a price not exceeding \$1.25 per acre, to be paid to the company, is interesting, in that the courts attempt to harmonize and give effect to all of the provisions of the act.

It was ruled in *Platt v. Union Pacific Ry. Co.*, 99 U. S. 48, as we have seen, that lands that were mortgaged to aid in construction of the road, were disposed of within the meaning of this provision, and that the primary purpose of Congress must control, and the privilege of settlement under the pre-emption law, and purchase from the company at \$1.25 per acre, must give way to the dominant purpose of Congress, as evidenced by the grant, intending that the company should use the lands to aid in construction of road.

In *Railway Co. v. Prescott*, 16 Wall. 603, the Supreme Court of the United States held that this clause created a contingent right of pre-emption in these lands and constituted an exemption of the lands from state taxation. That case was afterwards overruled in *Railway Co. v. McShane*, 22 Wall. 444.

In the case of *United States v. McShane*, 3rd Dillon, 303, 310, Circuit Judge Dillon, speaking of this provision, says:

“It is not my purpose to discuss at length the respective rights of the general government and of the railroad company in the lands, after the lapse of three years from the completion of the road, nor whether a mortgage of the lands is such a ‘disposition’ of them as would defeat the right of settlement or pre-emption. The proofs show that the company has dealt with these lands, and is now dealing with them as if they were in all respects their absolute property. They are advertising and selling them at their own prices and upon their own terms, and they do not recognize the rights of the public to settle upon and pre-empt them, and to buy them at \$1.25 per acre. On the other hand, neither congress nor the interior department has taken any steps to subject these lands to settlement and pre-emption, and the public are denied the right to the benefit of the privilege or reservation in their favor.

“I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this

period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding \$1.25 per acre, being payable to the company instead of the government.

“This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the ‘right and title to the lands.’ During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but ‘subject’ to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.



“If this be a correct view of section three of the act of 1862, it results that the lands of the company so far as they are patented, are subject to taxation by the authority of the state, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with and will not defeat the rightful authority of the state to tax the lands.”

In *Railway Co. v. McShane et al.*, 22 Wall. 444, the Supreme Court of the United States affirmed the decree of the court below and held that the lands were subject to taxation. Mr. Justice Miller, speaking for the court, says:

“The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular

person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

“We are of the opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of *Railway Company v. Prescott* asserts a different doctrine, it is overruled.”

The case last cited was decided by the Supreme Court at the October term, 1874, while the case of *Platt v. U. P. Ry. Co.*, 99 U. S. 48, was not decided until the October term, 1878.

In *Heath v. N. P. Ry. Co.* 38 Land Decisions, 77, Assistant Secretary Pierce, construing the Joint Resolution of May 31, 1870, (16 Stat. 378) making a grant of lands between Portland and Puget Sound to the Northern Pacific Railway Company, which contained a proviso that all lands thereby granted, which shall not be sold or disposed of, or remain subject to the mortgage authorized by the act, at the expiration of five years after the completion of the road, should be subject to settlement and pre-emption like other lands, at the price, to be paid to the company, of not exceeding \$2.50 per acre, says:

“Moreover, the main purpose of the grant made by the joint resolution was the construction of the road from Portland to some point on Puget Sound, and, if Congress also intended by the proviso under consideration that the land remaining unsold five

years after the completion of the road should be subject to pre-emption to the end that the country might be rapidly developed, such latter intention was surely secondary to the main purpose of the grant and if not compatible therewith must yield to such main purpose, and, if necessary, fail entirely. See *Platt v. Union Pacific Railroad Company*. Congress evidently supposed that within five years after the completion of the road all of the lands granted would be surveyed and the entire matter finally settled, while in fact such has not been the case. The road was completed not later than June 10, 1888, and even at the present time the grant has not been finally adjusted and all of the lands have not been surveyed. It is too obvious for argument that the failure of the Government to survey the lands has seriously interfered with the company's ability to finally dispose of the same to advantage because, while it might have been entirely feasible to raise money upon mortgaging the inchoate, indefinite claim to lands generally, it would be wholly impracticable to sell such lands and receive therefor anything like the actual market value of the lands themselves. \* \* \*

"Moreover, the preemption law which was in existence at the date of the grant to this company was repealed by the Act of March 3, 1891, (26 Stat. 1097). Appellant claims that the term as used in the repealing statute applied only to the technical preemption act of 1841 and cites decisions of the Department where the term 'preemption' has been held to have a much broader meaning than that applied to it in connection with the act of 1841.

"In answer to this it is sufficient to state that



by section 4 of the act of March 3, 1891, *supra*, not only was the preemption law of 1841 repealed but all other laws allowing preemptions of the public lands of the United States were repealed. See the decision of the Court of Appeals of the District of Columbia in the case of Menasha Woodenware Company, assignee of William Gribble (37 L. D. 564.)”

We need not, therefore, for the purposes of the contention we are now making, consider the question whether Congress by the Act of April 10, 1869, or by Section 4 of the Act of May 4, 1870, could compel the Railroad Company, after having granted the fee to these lands, to sell the same to so-called “actual settlers” not then in existence, and to a class of actual settlers not definitely in existence at some time prior to issuance of patents. This construction of the actual settler clause harmonizes with the main purposes of the grant and clearly indicates that the words “actual settlers only” had relation to a preferred class, and that Congress did not attempt, either by condition subsequent or by a covenant resting upon the good faith of the grantee, to control the title to this land after patent had issued.

It is familiar history that the pre-emption law, although the first act passed by Congress as early as 1830, which attempted to legislate in favor of the settler, was the instrument under which large areas of the public lands passed to persons other than bona fide settlers upon the public lands.

Donaldson's work entitled, “Public Domain,” vol. 19, House Miscellaneous Documents, Sec-

ond Session, 47th Congress, 1882-83, pages 214, 215, 678, 695, 1247.

Pressure to repeal the pre-emption laws became so great that the repeal was finally effected by the Act of March 3, 1891, (26 Stat. 1097) and with it, as we have seen, not only the policy of the United States, as to disposition of its public lands under the pre-emption law, requiring a short term settlement and a purchase in cash, was discontinued. The obligation of the company under these grants, even if the pre-emption law was at no time applicable to the land grants of the company, was waived, in harmony, it may be said, with the policy indicated by the Timber and Stone Act of June 3, 1878, (20 Stat. 89).

Furthermore, it will be remembered that on March 3, 1853, (10 Stat. 244) Congress passed an act providing "that the pre-emption laws of the United States, as they now exist, be and they are hereby extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by Acts of Congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver, or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction; Provided, That no person shall be entitled to the benefit of this act who has not settled and improved, or shall not settle and im-

prove, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office; And provided further, That the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law, or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres."

This statute was in effect, unrepealed, on April 10, 1869, and May 4, 1870. It was unrepealed on May 28, 1862, (12 Stat. 392) when the Homestead Act was passed. It gives precision and legal accuracy to the words "actual settlers only" used in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870. This act expressly provides, as we have seen, that no person should be entitled to the benefit of it, who has not settled and improved, or who shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office. This must be construed to mean that, until the action of the Land Department in withdrawing the lands for the benefit of the grant made, an actual settler may, under the pre-emption laws, at the price of \$2.50 per acre, acquire not to exceed 160 acres; but that after the final allotment—whatever those words may be construed to mean—the privilege in favor of the actual settler, is lost.

This construction of the Act of March 3, 1853, harmonizes the original act of July 25, 1866, as amended April 10, 1869, and also harmonizes all the provisions



of the Act of May 4, 1870. It gives security to titles granted by these acts, and the patents issued have probative, final and conclusive effect. There would remain no secret, reserved, right of action in favor of the United States, based upon a possibility of reverter, resulting, as here, in an attempt by the United States to assert a breach of an alleged condition subsequent and to re-enter upon these lands forty-two years after the first patents were issued to the company, and after the company had conveyed these lands to other persons, in some instances by warranty deeds, and after it had mortgaged these lands to secure construction funds, and after it had expended large sums of money to complete construction of road, and in various ways had relied upon and supposed it owned an absolute title in fee simple.

It is therefore respectfully submitted that the court should adopt this construction thus acted upon, and under which the rights of all the parties have been fixed. This is not only a just and reasonable construction but one which gives effect to all the words of the statute, and is in harmony with the public policy of the United States in respect to the disposition of lands of the class involved in this suit.

While we cannot consider the individual opinions of members of Congress, expressed in debate, on a measure which afterwards becomes a law, as to the meaning of such measure, it may be helpful to note that Mr. Sargent, in discussing the bill which became the Act of May 4, 1870, said:

“One word in regard to the policy of land grants

for railroads in the future. If they can be carefully guarded, as this bill is, so *that while they construct roads* the lands shall also go to the settlers in limited quantities, at small prices, then I am in favor of them."

This may well be the proper construction of the act, as passed. It was no doubt confidently expected that with the announced construction of the road, settlers would immediately apply for and purchase these lands. It was supposed that all of these lands would be thus applied for prior to completion of road and acceptance of same by the United States. Congress may have been ignorant of the inability of the company to make such sales, and probably did not anticipate that actual settlers would not apply to purchase all of these lands while the road was being constructed. However that may be, it should be held to have been the intendment of the act and the intention of Congress that the lands would be applied for by actual settlers and purchased pending construction, so that the company might have the benefit of the purchase price and so that the primary purpose of Congress might be effected.

## X.

(1) THE LANDS INVOLVED IN SUIT WERE MAINLY PATENTED MORE THAN FIVE YEARS PRIOR TO THE COMMENCEMENT OF THIS SUIT, AND THESE PATENTS WERE ALL ISSUED BY THE UNITED STATES WITH FULL KNOWLEDGE UPON THE PART OF THE GOVERNMENT OF CONTINUOUS BREACHES OF THE SO-CALLED "ACTUAL SETTLER" CLAUSE. THE CAUSE OF SUIT, OR ACTION, TO RECOVER THESE LANDS, AND TO ASSERT THE BREACH, AROSE WHEN EACH BREACH OCCURRED, AND THE UNITED STATES, AS TO ALL BREACHES OCCURRING PRIOR TO ISSUANCE OF PATENTS, IS NECESSARILY BARRED AFTER THE EXPIRATION OF FIVE YEARS FOLLOWING THE DATE OF PATENTS ISSUED PRIOR TO MARCH 2, 1896, AND AFTER SIX YEARS FOLLOWING THE DATE OF PATENTS ISSUED AFTER THAT DATE. THE ACT OF MARCH 3, 1891, (26 STAT. 1905) AND THE ACT OF MARCH 2, 1896, (29 STAT. 42), READ IN CONNECTION WITH THE ACT OF SEPTEMBER 29, 1890, (26 STAT. 496) IS MORE THAN A MERE STATUTE OF LIMITATIONS. IT IS TITLE IN FEE SIMPLE, WITHOUT CONDITION OR POSSIBILITY OF REVERTER.

(2) THE OREGON AND CALIFORNIA RAILROAD COMPANY, ON MARCH 29, 1870, BY ITS DEED OF THAT DATE, BECAME THE PURCHASER, FOR VALUE, OF ALL THE LANDS GRANTED BY THE ACT OF JULY 25, 1866, TO THE EAST SIDE COMPANY, AND ON OCTOBER 6, 1880, BY ITS DEED OF THAT DATE, FOR VALUE, BECAME PURCHASER OF ALL THE LANDS GRANTED BY THE ACT OF MAY 4, 1870, TO THE WEST SIDE COMPANY, AND THE OREGON AND CALIFORNIA RAILROAD COMPANY HAS BEEN EVER SINCE SAID DATES RESPECTIVELY, THE BONA FIDE OWNER AND IN POSSESSION OF THE LANDS SO GRANTED, AND AS SUCH, PATENTS ISSUED TO IT, AND, AS SUCH, THE



**OREGON AND CALIFORNIA RAILROAD COMPANY IS A BONA FIDE PURCHASER, AND HAS BEEN RECOGNIZED AS SUCH BY THE UNITED STATES, CONTINUALLY SINCE THE DATES OF SAID DEEDS, RESPECTIVELY.**

Independently of the effect of the issuance of patents from 1871 down to 1909, as shown by Exhibit 11 to the Answer, and as admitted by subdivision 19, item 3, page 40, "Stipulation as to the Facts," as constituting waiver and estoppel as against the United States, it seems to us beyond doubt, that the United States can not by this suit do indirectly what it could not do in the face of the act of March 3, 1891 (26 Stat. 1095), and the act of March 2, 1896 (29 Stat. 42), limiting the time in which suits to set aside patents may be brought to the period stated. As well said in *United States v. Arredondo*, 6 Pet. 691, 728:

"A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *Patterson v. Winn*, 5 Pet. 241. The grants of colonial governors, before the revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any else-

where, we are bound to presume and consider, that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony or province where it lies."

This suit is in effect a collateral attack upon these patents in this, that if the United States should prevail and these lands should be forfeited and the title of the United States quieted, there would be a decree directly in the face of the formal conveyance of this title by these many patents.

In *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 957, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

"In all these cases the land that was the subject-matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of these lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or in any other recognized mode, has

been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack. *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlin*, 104 U. S. 420; *Smelting Co. v. Kemp*, 104 U. S. 636, 645-647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142, U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030."

These patents if erroneously issued should have been set aside under suits authorized by the act of March 3, 1887, and they were erroneously issued if they were issued at a time when the company had continually, to the knowledge of the United States, violated this alleged condition subsequent and subjected the title to forfeiture.

Since this suit was commenced the Secretary of the Interior has suspended further issuance of patents upon the express ground that it is claimed that there has been a breach of the condition subsequent and that the United States has declared a forfeiture and the matter is now in court.

It was the duty of the United States, acting by its land department, to see that the conditions of the grant were observed by the company, and this duty was a



continuing one from the inception of the title to the date of issuance of patent, and even until the statute of limitations had fully run.

In *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 475, affirming 67 Fed. 948, Mr. Justice Brewer, speaking for the court says:

“Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be *conclusive* against the Government, and this notwithstanding any *errors, irregularities* or *improper action* of its officers therein.”

In *Smelting Co. v. Kemp*, 104 U. S. 636, 640, Mr. Justice Field, speaking for the court, says:

“The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unsailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the

law, is intrusted, that all the requirements preliminary to its issue have been complied with."

In *Steel v. Smelting Co.*, 106 U. S. 447, 450, Mr. Justice Field, speaking for the court, says:

"That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In *Maxwell Land-Grant Case*, 121 U. S. 325, 381, Mr. Justice Miller, speaking for the court, says:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants,



the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

It was unnecessary to pass the joint resolution of April 30, 1908, in order to enable the United States to assert its rights in respect to these lands and determine by an appropriate proceeding whether or not there had been a breach of the alleged condition subsequent, whether the actual settler clause created a condition subsequent, and generally to fix the status of these lands. Such suit need not have been necessarily to set aside these patents as having been erroneously

issued, but the general jurisdiction of a court of equity could have been asserted by the United States in this court to determine these questions.

In *United States v. Missouri &c., Railway Co.*, 141 U. S. 358, 381, the court says:

In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 286, which was a suit by the United States to set aside a patent alleged to have been improperly issued, and in which the right of the Attorney General to bring such a suit was denied, this court held that such an action could be maintained where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own. In the recent case of *United States v. Beebe*, 127 U. S. 338, 342, it was said: 'And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked. . . . Even if it had not been thus authoritatively settled, it would have been difficult, upon principle, to reach any other conclusion. The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and, under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one

individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the Government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings to vacate such patent. In the case before us, the bill avers that the patents, whose cancellation is asked for, were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform this obligation until these fraudulent patents are annulled, and that they therefore bring this suit to annul these fraudulent instruments, whose existence renders the United States incapable of fulfilling their said prior obligation.' These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice."



It could have been determined in such a court of equity whether the words of the actual settler clause created a promissory or good faith covenant depending for its enforcement upon the good faith of the grantee, and whether any intending actual settler had any right to apply to purchase any of these lands. Such suit could not have been brought to enforce the clause as a trust or contract in favor of the alleged beneficiary, but the status of the land and the right of the public under a proper administration of the grant could have been thus determined, and it was the duty of the United States from the beginning to have asserted this public right in behalf of the class of its citizens contemplated by the act.

A remedy was found in the case of *Whiteside County v. Burchell*, 31 Ill. 68, 78, where it was held in a proceeding brought in chancery by the State's Attorney, that the grant there under consideration was made directly to the State without any limitation of its power, and that the execution of the grant rests in the good faith of the State.

It could have been determined in any suit brought by the United States whether these words in the actual settler clause vested in the company title to these lands and left their disposition under the actual settler clause to the good faith of the grantee delegated in that behalf to perform a public duty.

See also *Dunklin County v. District County Court of Dunklin Co.*, 23 Mo. 449, 456.

See also *Cooper v. Roberts*, 18 How. 181; *Gaston v. Scott*, 5 Or. 48, 54.

The case of *Steel v. Smelting Co.*, 106 U. S. 447, and the rule there announced, was followed by the court in the case of *Small v. Lutz*, 41 Or. 570, 578.

If a private party had executed deeds to these lands covering a period of years from 1871 down to 1909, aggregating 2,894,566.98 acres, as patented here, and such grantor had so executed such deeds with knowledge of the alleged breaches, and if, from time to time, the grantor had dealt with his lands in the way we have shown the United States has dealt with its lands, and if this private grantor had prescribed certain rules by which it should be determined whether the grantee had complied or was complying with the terms of the deeds, would not this cause of action be deemed to arise at the moment he discovered any breach of the condition under which the title was held, and would not such person be called upon to act with promptness and to observe in that respect the limitations of the statute of limitations? What reason is there to apply a different rule to the United States where it disposes of its lands in its proprietary capacity, and especially where, as here, it exercised that proprietary capacity primarily to secure the construction of a railroad, which it greatly desired, and also granted the land with a supposed limitation or condition that they should be so applied to aid in the construction of the road, and at the same time should be sold to actual settlers in small quantities, at this limited price, in

the interest of its land policy and in the interest of its citizens of that class? Why should not the United States be barred of its right to assert or enforce this possibility of reverter which it is claimed was created by the condition?

Furthermore, the act of September 29, 1890 (26 Stat. 496), was a statute of repose, and was intended to be an exercise, once for all, of the right of forfeiture of lands granted to railroads for their failure, or the failure of any one of them, to comply with any of the terms or conditions of the grant.

The attention of the Court is called to the history of this legislation on the subject matter.—

Senate Report No. 906, of date January 2, 1883, accompanying Bill S. 2301, providing for the forfeiture of railroad grants in certain cases (see Vol. X, Testimony, pp. 22–310) is a report from the Judiciary Committee of the Senate, of which Mr. Garland was chairman. The bill recommended for passage accompanies the report, and section 3 thereof reads as follows:

“Section 3. That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by the act or acts granting lands to or in aid of it, or amendatory thereof.”

The debates in Congress at that time show that forfeiture of unearned railroad grants was an important and dominant matter, and this continued from 1883 up to September 29, 1890, when the general forfeiture



act was passed. As we shall presently see, this section 3, expressly providing that the bill, if passed, should not be construed to be a waiver of any condition or requirement imposed by the grants was eliminated in the same way that section 7 of the substitute bill reported by Judge Payson, as chairman of Committee on the Public Lands, was eliminated.

It will be remembered that on March 8, 1886, Mr. Henley, from the Committee on the Public Lands, made a report, known as Report No. 931, for the forfeiture of this particular grant, and that he submitted an elaborate argument justifying the report. The bill reported by Mr. Henley was intended to apply to the grant made to the California & Oregon Railroad Company in California.

On the same day Mr. Henley, from the Committee on the Public Lands, submitted Report No. 930, supporting a bill to forfeit this grant in so far as it applied to the Oregon & California Railroad Company.

On May 24th, 1884, Mr. Lewis, from the Committee on the Public Lands, submitted Report No. 1664 to accompany a bill or resolution prohibiting the confirmation, certification and patent of unearned land grants. Accompanying each of these reports was a strong minority report.

On May 29th, 1890, Mr. Payson, chairman of the Committee on the Public Lands, made a report, No. 2215, to the House of Representatives, Fifty-first Congress, First Session, entitled "Lands granted to aid in

the Construction of Railroads,” and at the same time submitted a substitute bill. This report, with the bill, is introduced in Vol. 6 of the testimony, page 1896, and is copied in Vol. 6, pages 1898, 1905. Section 7 of the substitute bill reads:

“Sec. 7. That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.”

Mr. Holman in his speech July 16, 1890, upon Senate Bill 2781, which became the Act of September 29, 1890, (26 Stat. 496) said:

“The House in the 48th Congress on its first day adopted Mr. Holman’s resolution:

“RESOLVED that in the judgment of this House all the public lands heretofore granted to states and to corporations to aid in the construction of railroads so far as the same are now subject to forfeiture by reason of the nonfulfillment of the conditions on which the grants were made, ought to be declared forfeited to the United States and restored to the public domain, etc.”

He quoted also from the reports of the Commissioner of Railroads for the years ending June 30, 1882, (page 42) and June 30, 1883, (page 49) showing the average price per acre obtained by the Northern Pacific Railroad Company for its granted lands, as reported to the Commissioner of Railroads. (See Volume 21 Congressional Record, Part XI, pages 574, 576 Appendix.)

On July 17, 1890, as disclosed by the Congressional Record, Volume 21, Part VIII, 51st Congress, First Session, page 7384, Mr. McRae said in discussing the General Forfeiture Act then pending:

“Mr. Chairman, a word or two in reply. My friend says we ought to have a “bill of peace.” That is exactly what we are trying to get. The gentleman speaks of a “bill of peace,” and yet the seventh section of his bill provides: ‘*Section 7.* That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.’ — — — There is a provision that is more liable to lead to litigation than anything else. It holds out the idea to the people that there is something else to be done. It puts in doubt the title of every acre of land on which people have settled, which lands were earned out of time, and we come in here with an amendment which will settle the matter forever by remitting it to the courts to quiet titles of the settlers’ homes as well as the railroad titles, if gentlemen who represent the other side are correct in their belief that the Supreme Court will decide against us.”

Evidently this language of Mr. McRae referred to the debate which took place on July 7, 1890, (See Volume 21 Congressional Record, Part VII, 51st Congress, First Session, page 7006.) where Mr. Payson, Chairman of the Committee on Public Lands, having in charge the bill, said:

“Now I am going to inquire of my friend as to



whether it will have the effect of confirming any title, or whether it shall prevent Congress from acting hereafter if it desired. That is covered by the seventh section, which I will read: 'That nothing in this Act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.' That is reserving the right on the part of Congress to do anything it may choose hereafter in any other form it pleases with reference to this very character of land."

The bill reported by Judge Payson is set out at page 7004, Volume 21, Part VII, Congressional Record, 51st Congress, First Session, and it was reported as a substitute for the bill which had passed the Senate. This bill contains Section 7 quoted as above.

The history of the bill shows that thereafter the House passed the measure as reported by the House Committee on Public Lands, and the substitute thus passed was sent to the Senate, and a conference committee appointed from that body, which resulted in the passage of the Act of September 29, 1890, with Section 7 of the House substitute stricken therefrom. While we may not quote the individual opinions of the members of Congress as expressed in the debates, to aid in the interpretation of the statute as passed, (See *U. S. v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290; *U. S. v. U. P. R. R. Co.*, 91 U. S. 72; *Carter v. Hobbs*, 92 U. S. 594; *U. S. v. Oregon, etc. R. Co.*, 57 Fed. 427, still we

may consider what occurred in the passage of the measure, the evil to be remedied, or the historical background.

Shallus v. United States, 162 Fed. 653.

Wadsworth v. Boysen, 148 Fed. 771.

Holy Trinity Church v. U. S. 143 U. S. 457.

U. S. v. Chicago etc. Co., 157 Fed. 616.

Mosle v. Bidwell, 130 Fed. 334.

Platt v. U. P. R. Co., 99 U. S. 48-67.

Smith v. Townsend, 148 U. S. 495.

Mobile etc. Co. v. Tennessee, 153 U. S. 502.

Johnston v. Morris, 72 Fed. 896.

Gold Hill Co. v. Caldonia S. M. Co., 5 Sawy. 577.

It must be remembered that the subject of forfeiture of unearned railroad grants had been a question of great importance both political and otherwise, from 1883 down to the passage of the General Forfeiture Act of September 29, 1890. There had been a statute passed on March 3, 1887, under which railroad grants were required to be adjusted by the Secretary of the Interior, and under which authority was given to maintain suits on request of Secretary of Interior made to the Attorney General. The purpose indicated by these various statutes and the debates occurring in relation thereto, was to ascertain what rights the United States had in the lands granted to various railroad companies? What the railroad companies respectively had done to earn the title to the lands? In what respect, if any, these railroads had failed to comply with the conditions under which the lands were granted? While the dominant and main question was as to whether or not the

railroad companies were entitled to any lands granted, where they had partially failed to construct their roads, or where as to certain portions of the grants opposite and coterminous with the unconstructed portions thereof they were entitled to any part of the lands granted, or were entitled to the lands opposite and coterminous with the portions of the constructed roads, apparently the object of Section 7 of the substitute and of Section 3 of the Act reported by Senator Garland accompanying Senate Report No. 906 was to leave open for further legislation the right of the United States to forfeit the title to lands belonging to the railroad company which had been forfeited because of some other breach of condition than the particular condition and breach thereof covered by the express words of the statute. Clearly if this Section 7 had been permitted to stand and become a part of the Act of September 29, 1890, it would justify the conclusion that Congress might properly assert its right to forfeit for failure to perform any other condition subsequent, and in this case, for failure to comply with the "actual settler" clause, if it shall be held that such clause creates a condition subsequent. Congress by its action having refused to pass Section 7 when it was distinctly submitted to each body for its consideration, must have intended that the Act of September 29, 1890, was a statute of repose in the nature of a bill of peace, and that as to all such lands as were opposite and coterminous with the constructed portions of the road which were constructed at that time, the title should be absolute and unquestioned, and that no breach of any condition sub-



sequent of any kind, for any cause, could be thereafter asserted.

Bearing in mind these facts, we insist that it was the manifest intention of Congress that the act of September 29, 1890 should put at rest the title to all lands granted to railroad companies, excepting as to such lands as were opposite to and co-terminous with the unconstructed portions of the railroad contemplated by the act.

Section 2 of that act jealously protects and guards the rights of "actual settlers in good faith on any of the lands" thereby forfeited.

It would be very strange, indeed, that Congress should have before it knowledge of the many breaches of this so-called actual settler clause, that the attention of Congress should be called to these reports required by law, in the debates on this very measure, although not specifically referring to the reports made by the Oregon and California Railroad Company, and that having such actual knowledge immediately before them, and having in mind actual settlers who might be entitled to these lands as now claimed, should deliberately strike out from the substitute bill section 7 intended to leave the matter open for future consideration and action by Congress, if its action was not final.

Not only was the act of September 29, 1890 a statute of repose and intended so to be, but likewise the act of March 3, 1891 (26 Stat. 1095), and the act of March 2,

1896 (29 Stat. 46). Both read in connection with the act of September 29, 1890 (26 Stat. 496), must be construed to be more than a mere statute of limitation.

These patents, whether erroneously issued, or otherwise, after the period of time named had elapsed, were absolute and undoubted title.

In *United States v. Chandler-Dunbar Water Power Co.* 209 U. S. 447, 449, Mr. Justice Holmes, speaking for the court, says:

“There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that ‘suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,’ that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute

presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell v. Warren*, 2 Black, 599.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell v. Warren*, 2 Black, 599, 605; *Sharon v. Tucker*, 144 U. S. 533; *Davis v. Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476."

Patents constitute conclusive evidence that the grantee has complied with the conditions of the grant, and to that extent the grant was thereby relieved from the possibility of forfeiture for breach of its conditions.

In *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 250, Mr. Justice Field, speaking for the court, says:

"It would therefore seem clear, that the title which passed under the act of Congress by the grant of the odd sections became by their identification so far complete as to authorize the grantee to take possession and make use of the lands; and in the exercise of that authority the grantee took possession from time to time as the lands became



identified by the location of the line of the road, and made sales of parcels of the lands, and executed mortgages on other parcels with sections of the road constructed, for the purpose of raising money to meet expenses already incurred and which might thereafter be required for the completion of the road; and such mortgages were authorized by Congress.

“But it is contended that the natural import of the granting terms of the act is qualified and restricted by its fourth section, which, as amended by the act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the president, upon the report of commissioners appointed to examine the work, patents shall issue to the company conveying the right and title to said lands on each side of the road as far as the same is completed.”

\* \* \* \* \*

“While not essential to transfer the legal right the patents would be evidence *that the grantee had complied with the conditions of the grant*, and to that extent that the grant was relieved *from the possibility of forfeiture for breach of its conditions*. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee’s right to the lands, and they would be evidence that the *lands were subject to the disposal of the railroad company* with the consent of the government. They would thus be in the grantee’s hands deeds of further assurance of his title, and therefore, a source of quiet and peace to him in its possession.”

\* \* \* \* \*

“ ‘In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.’

“Whilst a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the act of Congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, the lands could not be disposed of by the company without the consent of Congress, *except as each twenty-mile section of the road was completed and accepted by the President*, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest, from different provisions of the act, that Congress intended to secure this application of them. Whatever disposition might be made by the company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control of Congress, either to compel their application for the construction of the road contemplated, or to

enforce their forfeiture if the road was not completed as required by the act. The application of the lands to the construction would not, of itself, operate to transfer the title; it would only remove the restriction upon the use and disposition of the title already possessed."

\* \* \* \* \*

"We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, *with the express or implied assent of the government.*"

In *United States v. Northern Pacific Ry. Co.*, 177 U. S. 435, 441, Mr. Justice Shiras, speaking for the court, says:

"This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expiration of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved the same. It is not, as put by the counsel of the



Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed."

It would seem, therefore, to be conclusive that the issuance of patent is the act by which, and the date when, the land department, charged with the duty of seeing that the conditions of the grant had been complied with, finally decides that all the conditions have been complied with, and that thereby a breach of any such condition is effectually and finally waived.

## XI.

(1) THE UNITED STATES MAY, AS SOVEREIGN, IMPOSE RESTRAINTS UPON ALIENATION OF ITS LANDS, BUT IT CANNOT DELEGATE OR IMPOSE UPON A PRIVATE PARTY SUCH AS A CITIZEN, OR RAILROAD COMPANY, THE SUBSTANTIVE ADMINISTRATION OF SALES OF ITS LANDS, OR THE ADMINISTRATION OF ITS SETTLEMENT LAWS. IF IN GRANTING THE FEE TO THE COMPANY, UNDER THESE ACTS, THE UNITED STATES IMPOSED A CONDITION WHICH, IF ENFORCEABLE, REQUIRED THE COMPANY, IN MAKING SALES, TO USURP THE FUNCTIONS AND DUTIES OF THE LAND DEPARTMENT OF THE UNITED STATES, AND ADMINISTER THE SETTLEMENT LAWS, AND IF THE UNITED STATES DID NOT THEREBY RESERVE, IN SOME WAY, THE RIGHT TO ENFORCE OR ADMINISTER ITS LAND LAWS APPLICABLE THERETO, THE CONDITION ATTEMPTED TO BE CREATED, IS VOID, AND THE TITLE IS UNAFFECTED THEREBY. THE ESTATE VESTED, ABSOLUTELY, UNAFFECTED BY THE ATTEMPTED CONDITION. THE INTENDED BENEFICIARIES, IF THE CONDITION WAS TO BE VALID AND EFFECTIVE, WERE ENTITLED TO REQUIRE THAT THE UNITED STATES SHOULD RETAIN JURISDICTION OF THE GRANT, AND ADMINISTER THE SAME. THE BENEFICIARIES WERE ENTITLED TO GO BEFORE A TRIBUNAL HAVING JURISDICTION AND AUTHORITY, TO HEAR AND DETERMINE THE FACTS, AS TO EACH SETTLEMENT, WHICH WOULD BRING EACH "ACTUAL SETTLER" INTO A LEGAL AND EFFECTIVE RELATION TO THE PARCEL UPON WHICH HE HAD SETTLED. THE RAILROAD COMPANY COULD NOT BE CONSTITUTED, AND IS NOT BY THE SETTLERS CLAUSE MADE SUCH TRIBUNAL. UNDER THE SET-

TLERS CLAUSE NEITHER THE UNITED STATES NOR THE ASSUMED BENEFICIARIES—THE ACTUAL SETTLERS, COULD COMPEL THE RAILROAD COMPANY TO ACT AS SUCH ADMINISTRATIVE TRIBUNAL, NOR WOULD ITS VOLUNTARY ACTION BIND ANY CONTESTING CLAIMANT, NOR COULD ANY COURT GIVE ANY DEFEATED CONTESTANT ANY RELIEF, OR AFFORD HIM ANY REMEDY. THE STATUTE GIVES NO REMEDY, PROVIDES NO TRIBUNAL, AND DEFINES NO PROCEDURE. IT IS THEREFORE VOID.

(2) THE TITLE TO THESE GRANTED LANDS HAVING PASSED FROM THE UNITED STATES TO THE OREGON AND CALIFORNIA RAILROAD COMPANY BY PATENTS, THE LAND HAVING BEEN EARNED BY CONSTRUCTION OF ROADS, THE ESTATE VESTED IN THE COMPANY IN FEE SIMPLE. THIS IS CONCEDED BY THE UNITED STATES. THERE IS THEREFORE NO ROOM FOR THE APPLICATION OF THE DOCTRINE THAT A PUBLIC GRANT WILL BE STRICTLY CONSTRUED IN FAVOR OF THE GRANTOR. SUCH RULE OF CONSTRUCTION DOES NOT APPLY WHERE THE UNITED STATES SEEKS TO DEFEAT THE ESTATE GRANTED, WHETHER BY MEANS OF A CONDITION SUBSEQUENT, OR OTHER ACTS THAT WOULD RENDER THE ESTATE DEFEASIBLE.

(3) THE ESTATE ONCE HAVING PASSED, THE LAW OF THE STATE IN WHICH THE PROPERTY IS SITUATED, AS DETERMINED BY THE SUPREME COURT OF THAT STATE, WILL BE FOLLOWED, AS A RULE OF PROPERTY, IN DETERMINING WHETHER THE LANGUAGE OF THE SO-CALLED "ACTUAL SETTLER" CLAUSE IS A CONDITION SUBSEQUENT, OR A COVENANT.

In *Wilcox v. McConnel*, 13 Peters, 498, 517, the court says:

"We hold the true principle to be this, that whenever the question in any court, state or



federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

There is nothing in the actual settler clause defining how or by whom its provisions shall be administered, or in what tribunal the applicant may have his rights adjudged so as to bring himself in relation to a particular tract of land. If Congress had specifically provided that the company should be guided by the rules and regulations in effect in the administration of the Homestead Act, or by the Pre-emption Act, and if Congress had provided a tribunal where the actual settler might make his proof, tender his payment, and have his status defined, and definitely ascertained, a different question might arise. It is sufficient to say that Congress has not done so. Even if it had attempted to delegate governmental and administrative functions to the company, it would be an attempt to confer upon a private corporation governmental, administrative and quasi-judicial functions. As we have seen in *Camp v. Smith*, 2 Minn. 131, 143, such limitation would be invalid. It was there said:

"The state can never concede to Congress the right to prescribe to the actual settler and purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The federal government may regulate

the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; Congress has then exhausted the power over the public lands reserved by the constitution of the United States, and the sovereignty of the state immediately attaches."

If Congress may not do this intrastate how much more certain it is that Congress cannot erect in the person of a private corporation, the functions of a governmental administrative body, and, without prescribing any mandatory provisions by which the company shall be guided, claim that there is a rule of action sufficient in law to control the administration of the grant and effectuate this "actual settlers" clause. It is in effect to say that Congress may lodge its power of the administration of its public lands in a private corporation, leaving to it unrestrained and unrestricted discretion as to the way and manner, and at what time the sales shall be made, and leaving to it arbitrarily to determine as best it can the qualifications of the actual settler who may apply to purchase. It is respectfully submitted that Congress failed to prescribe any rules or regulations by which the administration of this "actual settler" clause could be enforced, and by which its terms could be brought into contract relation with the actual settler, and that therefore the attempted restriction or limitation must fail.

The court will not indulge the presumption that by the words of the proviso of April 10, 1869, or of Section 4 of the Act of May 4, 1870, known in this record as the "actual settler" clause, that Congress intended by a mere subsidiary and secondary provision of legislation to entrust a railroad company about to construct a great national highway *with the administration of the public land laws as to the lands granted in aid of such construction*. It will not be presumed that Congress intended thereby to create such a tribunal for the administration of this statute, the ascertainment of the character of lands that were subjected to its provisions, the determination of who are actual settlers, the length, duration, and character of such settlement and improvements,—specially and apart from the regular land department of the United States. It certainly was not in the contemplation of Congress that these railroad companies should assume the necessary administration of the public land laws in that regard, if this proviso shall be deemed to be valid and enforceable in its full scope, or, if it shall be deemed to be a condition for breach of which there might be resulting forfeiture of the grant.

Under the Act of Congress admitting the State of Oregon into the Union, approved February 14, 1859, and the Act of the Legislative Assembly of the State of Oregon approved June 3, 1859, assenting to the same, (Lord's Oregon Laws, pp. 25-29) it was expressly provided that certain propositions submitted by the Act of Congress to the people of Oregon were offered on condition that the people of Oregon should provide,



by an ordinance irrevocable without the consent of the United States, "*That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in said soil to the bona fide purchasers thereof.*" By the Act of June 3, 1859, the State of Oregon, by an act of its Legislative Assembly, expressly assented and agreed to this provision. The contract under which the state came into the Union was *not unilateral*, but was binding upon the United States as well as upon the state. Under this organic act it is fairly inferable that while the state may never interfere with the primary *disposal* of the soil within its boundaries, by the United States, nor with any regulations Congress may find necessary for securing the *title* in said soil to the bona fide purchasers thereof, that the United States may not, after that title has passed from the United States to a citizen or a corporation, for value received, under any reservation under which the title was granted, or under any condition that is repugnant to the grant or contrary to its purpose and spirit, *retain control of such lands granted, or be reinvested with its former estate. Such a proviso, or such a condition, may well be considered as in restraint of alienation, and not within the power of Congress.* Whether this be so or not, in its strict sense, it is certain that in construing doubtful words that are claimed to affect the title to lands thus granted, the courts will construe the words used in harmony with the theory that title has vested absolutely, without possibility of reverter, rather than under conditions

subsequent, for breach of which there could be forfeiture and re-entry.

In this connection it may be well to observe that where an amendatory act is passed, such as the Act of April 10, 1869, which contains no express words of *new and additional grant*, but which undertakes to provide *that lands granted by the Act of July 25, 1866, shall be sold to actual settlers only, in quantities and for prices as stated, in the nature of things a condition affecting the estate previously granted, could not be imposed, and that a condition subsequent cannot be created, excepting at the time, and in connection with, the granting of the estate.* As we have seen, the object of the Act of April 10, 1869, was not to vest an estate in either the East Side or West Side Company, but to enable the East Side Company, if it chose so to do, to file its assent to the Act of April 10, 1869, and thereby bring itself into a legal relation to the grant, so that a judicial determination might be had as to whether the East Side Company or the West Side Company was the legally designated beneficiary of the grant. *No new substantive rights were intended to be or attempted to be created, and the most that could be said would be that if the East Side Company, after the passage of the Act of April 10, 1869, and pursuant thereto, for a sufficient consideration, filed its assent to said Act, it thereby contracted with the United States that it would sell these lands as provided by the "actual settler" clause, or at least such of these lands as could be so sold within a reasonable time, or such of these lands as could be sold prior to and pending construction of road, and*

*before patents issued.* Under such circumstances the contract thereby created would be a personal covenant between the United States and the designated beneficiary, the East Side Company. It would not be a covenant that would run with the land, nor would it be a condition subsequent. *A sale of the grant to the Oregon and California Railroad Company, recognized by the United States, would cut off the efficacy of the covenant, and especially if the United States assented to the transfer, and did not insist upon the performance of the covenant by the grantee of the East Side Company.* In construing these words it must be borne in mind that the land department *had recognized*, and was dealing with the West Side Company, as the company entitled to the grant, and that it was not until December 25, 1869, when the West Side Company failed to construct its first twenty miles, *that it lost its claim to the grant.* Secretary Browning had recognized the West Side Company; that company had filed its assent; was engaged in construction of road; was claiming the grant, and was using all possible effort to construct the first twenty miles. That Company opposed the passage of the Act of April 10, 1869. The East Side Company, it may be assumed, was willing that the Act of April 10, 1869, should be passed, in fact the record shows that on November 25, 1868, the East Side Company formally accepted the benefits of the Act of July 25, 1866, and commissioned John H. Mitchell to go to Washington D. C. and represent the East Side Company in all its matters before Congress. *Under such circumstances can it be said that the proviso of the Act*



*of April 10, 1869, when accepted by the East Side Company, and when that company assented to its provisions, was anything more than a covenant upon its part, that it would undertake to sell these lands as the statute provides?* There is no controversy between the Government and the companies as to whether or not title passed under the Act of July, 25, 1866, to the Oregon and California Railroad Company, as the grantee of the East Side Company, and there is no question but that that title was one in fee simple. There is therefore no room to indulge the principle that a public grant will be construed favorably to the United States, and strictly against the grantee, and that nothing will be presumed to have been granted excepting what appears upon the face of the statute or granting act, *but such is not the rule, as applied to grants of the kind in question.*

In *United States v. Denver etc. Ry. Co.*, 150 U. S.

1, Mr. Justice Jackson, speaking for the court says:

“It is undoubtedly, as urged by the plaintiffs in error, the well settled rule of this court that public grants are construed strictly against the grantee, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona and St. Peter R. R. v. Barney*, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: ‘The acts making the grants  
\* \* \* are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used

if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the Act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare, by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works, of a quasi public character in or through an immense and undeveloped public domain, *such legislation stands upon a somewhat different footing, from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.* Bradley v. New York & New Haven R. R., 21 Conn. 294; Pierce on Railroads, 491.

"This is the rule, we think, properly applicable to the construction of the Act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of the opinion that the benefits intended for the construction of the railroad in permitting the use of the timber or other material, should be extended to and include the structures mentioned in the act, as a part of such railroad."

This rule has been well stated in another form by this court, in *United States v. St. Anthony R. R. Co.*, 114 Fed. 722-724, where Morrow, Circuit Judge, speaking for the court says:

“It is well settled that, while public grants are to be construed strictly against the grantee, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. *Railroad Co. v. Barney*, 113 U. S. 618, 625; 5 Sup. Ct. 606, 28 L. Ed. 1109. In *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 1-15, 14 Sup. Ct. 11, 37 L. Ed. 975, this rule of construction was held to be properly applicable to the Act of 1875, in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railway of the defendant, but was used in the construction of its road at points distant from the place from which it was taken. Under the rule of construction above stated, it was held to be the purpose of Congress to aid railroad companies entitled to the benefits of the act, by conferring the right to take timber necessary for road construction from adjacent public lands, and use it upon distant portions of their lines. Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that, according to the admitted facts, there was no suitable timber upon either side of the said road nearer than the lands in question, and



and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefitted thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privileges conferred by Congress has been properly exercised, and whether the mutual benefits contemplated by the act are likely to be realized."

While this case was reversed by the Supreme Court of the United States in *United States v. St. Anthony R. R. Co.*, 192 U. S. 524, the rule of construction thus announced was reaffirmed. Mr. Justice Peckham, speaking for the court, quotes at length with approval, from the opinion of Mr. Justice Jackson, in *United States v. Denver etc. Ry. Co.*, 150 U. S. 1 and as quoted by us above.

A liberal construction in favor of the general spirit and purpose of the Act of July 25, 1866, was given to that act by the Supreme Court in *Bybee v. Oregon & California R. R. Co.*, 139 U. S. 663-679, where the court, speaking by Mr. Justice Brown, says:

"The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court *as taking effect in praesenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with

the Secretary of the Interior. The Act then operates as a grant of all odd numbered sections within the limits, except so far as they may have been in the meantime "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of." And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings or by an act of Congress, resuming title to the lands."

In the course of the opinion Mr. Justice Brown further says:

"A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted land, is manifestly so harsh and unjust, that *the breach of such condition ought not be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction.*"

This language was used with reference to the proviso of Section 8, that in case the company should not complete the road as provided in Section 6, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, *shall revert to the United States.*"

How apposite is this language of the Supreme Court as applied to the contention of the United States now

made in the case at bar!! The Government contends that because the company has sold *timber lands unfit for actual settlement*, to persons other than actual settlers, in quantities in excess of 160 acres, and at prices in excess of \$2.50 per acre, *that it has forfeited the title to all of the unsold lands of every kind, the effect of which is not only to deprive the railroad company of the consideration for building the road, but to place it within the power of the railroad company by its administration of a public grant, to thwart and destroy the so-called public land policy of the United States, when it enacted this proviso, and in the destruction of this estate, not only deprive the road of the grant, but destroy all rights of the so-called actual settlers, then or at any time thereafter. The courts will not give any such consideration to the actual settler clause.*

The case of *United States v. Denver etc. Ry. Co.*, 150 U. S. 1, *supra*, has been adhered to in the following cases:

*Wisconsin Central Ry. Co. v. Forsythe*, 159 U. S. 46-55.

*United States ex rel v. C. O. & G. R. R. Co.*, 3 Okla. Rep. 404-502.

*United States Trust Co. of New York v. Territory*, 8 New Mex. 673-689.

*Moon v. Salt Lake County*, 27 Utah, 435-444.

It is therefore unnecessary as it seems to us, to *interpolate words of forfeiture* into the Act of April 10, 1869, or of May 4, 1870, or to assume that any public land policy secondary in its purpose and character



should control, and induce the court to adopt a construction which will destroy the estate granted, rather than sustain that estate. Nor are we left without controlling authority upon this subject. In *Stuart v. Easton*, 170 U. S. 383, Mr. Justice White, strongly adhering to *the rule of property as found in the decisions of the Supreme Court of Pennsylvania*, and quoting at length from these common law cases adopting the common law rule, says:

“If the grant be viewed as one merely to trustees to hold ‘for the uses and purposes mentioned in the act of the assembly,’ it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that*; *provided*; *if it shall happen*; etc. 4 Kent Com. note b, p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled *with any clause of re-entry or a provision that the estate conveyed should cease or be void on any contingency*. (Ib.) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while*; *so long as*; *until*; *during*, etc., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions imparting a condition or limitation, and examine the deed with a view of eliciting *the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.*”

In *Wright v. Morgan*, 191 U. S. 55–58, Mr. Justice Holmes, speaking for the court, construing an Act of Congress granting to the City of Denver certain property rights, says:

“If the legal title was in the city it was an absolute title. *In view of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used*, it needs no argument to show that there was no condition or limitation here. *Stuart v. Easton*, 170 U. S. 383.”

The court also had occasion to speak of the question as to whether or not Congress could declare land within the limits of a state, after title has passed from the United States, inalienable at common law, and, by analogy, whether Congress can impose a condition upon an estate, in restraint of alienation, or which might, for breach of such condition, cause the title to revert to the United States, and thereby deprive the state of its jurisdiction and control over these lands. Upon this subject Mr. Justice Holmes, speaking for the court, says:

“Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a state, when the conveyance was absolute and was made to a citizen or instrumentality of the state; we express no opinion upon the point. It is enough that it did not purport so to restrict the ordinary incidents of title. We should require *the clearest expression of such an unusual restriction before we should admit that it was imposed*, especially in an ordinary sale for cash.”

And so in the case at bar, the court should not strive to construe these words as creating conditions

subsequent, for breach of which this title would be liable to forfeiture, with all resulting injury to the beneficiary that had complied with the Act of Congress in its important and controlling purpose, and with all of its damage and loss to the state in which the lands are situated, in the deprivation of taxes upon these lands, and other incidents of its sovereignty, and at the same time result in placing these lands as they are now sought to be placed by the Innocent Purchasers Act of August 20, 1912, in a state of reservation, after confirming the title to the timber investors who bought from the company, after having exacted from these timber investors the nominal price of \$2.50 per acre for these lands, justified by a report of the Public Lands Committee that these lands were unfit for settlement, chiefly valuable for timber, and therefore they might as well be patented to these so-called Innocent Purchasers, although the sale made by the company to these same so-called Innocent Purchasers is the gist of the bill of complaint, as to breach of the "actual settler" clause.

See also *Palatine Ins. Co. v. Ewing et al.*, 92 U. S. 111, 114. This court, in harmony with the view expressed by the Supreme Court, as we have seen, will rather follow the rule of law adopted by the Supreme Court of Oregon in *Raley v. Umatilla County*, 15 Or. 172-179, and in *Coffin v. City of Portland*, 16 Or. 77-80, holding that "a condition subsequent in a deed, that will under any circumstances defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it shall



operate as a forfeiture of the estate granted." In other words, this court will, as the Supreme Court did in *Stuart v. Easton*, supra, follow the rule of property found in the decisions of the Supreme Court of the state in which the lands are situated, and this court will follow the rule of law announced by the Supreme Court of the United States, as in harmony with the Supreme Court of Oregon, in the cases cited, *as to what words are necessary to constitute a condition subsequent, and will adopt that view which will leave the estate vested, rather than destroy the estate, and will at the same time give purpose and effect, if possible, to the intention of Congress.*

## CONCLUSION

From the voluminous record which we have undertaken to review and briefly summarize, we contend that the following controlling ultimate facts have been established:

### I.

That on July 25, 1866, Congress passed an act entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland, in Oregon," by which a grant of lands in quantity was made to the California and Oregon Railroad Company organized under the laws of the State of California, and to such company organized under the laws of Oregon as the Legislature of the State might thereafter designate, and that these companies thereby obtained a grant in presenti to the lands involved in suit other than those inuring to the company under the act of May 4, 1870.

### II.

That on November 21, 1866, the Oregon Central Railroad Company of Portland, known in this record as the "West Side" company, filed its articles of incorporation in the office of the Secretary of State at Salem, Oregon, and that it claimed to have been incorporated and its articles to have been filed on or before October 10, 1866.

### III.

That on October 10, 1866, the Legislature of Oregon attempted to designate the said "West Side" company as the beneficiary of the act of July 25, 1866, and as the Oregon company entitled to earn the grant.

## IV.

That on May 25, 1867, the "West Side" company adopted a resolution assenting to and accepting the benefits of the act of July 25, 1866, and that thereafter a certified copy of such resolution was duly filed with and accepted by the Secretary of the Interior, and within the time required by the act of July 25, 1866.

## V.

That on April 22, 1867, the Oregon Central Railroad Company of Salem, hereinafter known in this record as the "East Side" company, duly incorporated under the laws of the State of Oregon, and on said day filed its articles of incorporation in the office of the Secretary of State, and thereby and thereafter *claimed to be the company entitled* to construct the railroad and earn the grant as provided in the act of July 25, 1866.

## VI.

That on April 15, 1868, the "West Side" company, and on April 16, 1868, the "East Side" company, commenced actual construction of road, claiming under the grant of July 25, 1866, and that each company industriously continued such construction; but that the "West Side" company failed to construct the first twenty miles by or before December 25, 1869, but that the "East Side" company did construct the first section of twenty miles by or before December 25, 1869, and was continuously engaged in the construction of its line from April 16, 1868, up to and after October 20, 1868, and thereafter until it conveyed its railroad and prop-



erty, including its land grant, on March 29, 1870, to the Oregon and California Railroad Company.

## VII.

That on October 20, 1868, the Legislature of the State of Oregon rescinded the Joint Resolution of October 10, 1866, and designated the "East Side" company as the company entitled to the benefits of the grant of July 25, 1866, and *as the company in contemplation of Congress under the act of June 25, 1868.*

## VIII.

That on June 25, 1868, the Congress of United States, then knowing that both the "East Side" and "West Side" companies were engaged in the actual construction of road, and then knowing that both companies claimed or would claim the benefits of the act of Congress of July 25, 1866, and of the land grant made therein, and knowing that the "West Side" company had filed its assent, and that the "East Side" company had not filed its assent and had not been designated by the Legislature of the State of Oregon, *passed an act by which the filing of assent was dispensed with, and by which the time for construction of the first twenty miles was extended to December 25, 1869, and the completion of road was extended to July 1, 1880.*

## IX.

That on April 29, 1868, the "East Side" company adopted a resolution accepting the grant of July 25, 1866, and empowered A. M. Loryea to present a duly certified copy thereof to the proper authorities to be

filed as certified by S. A. Clark, Secretary of the "East Side" company, under date of April 30, 1868 (Volume XIV, pages 7454-5, Transcript of Record), and in connection therewith adopted a resolution appointing A. M. Loryea, agent and representative of that company April 15, 1868 (Volume XIV, pages 4934-8, Transcript of Record), and that A. M. Loryea on July 16, 1868, wrote a letter to Secretary Browning (Volume XIV, page 7454), receipt of which was acknowledged by Secretary Browning in his letter of July 17, 1868 (Volume XIV, page 7440), *declining to regard the resolution as an assent filed within the time, although the filing of assent had been dispensed with by the act of June 25, 1868.*

## X.

That thereafter, on November 25, 1868, after the Legislative Assembly had passed the Joint Resolution of October 20, 1868, designating the "East Side" company as the beneficiary of the act of July 25, 1866, the "East Side" company again adopted a formal resolution assenting to the Act of Congress of July 25, 1866 (Volume X, page 5026, and employed J. H. Mitchell to represent that company at Washington, D. C., and presumably to present this resolution to the Secretary of the Interior and to the Congress of the United States, and to secure such legislation, if any, as might be deemed advisable to enable the "East Side" company *to be recognized as the beneficiary of the grant instead of the "West Side" company, which up to that time had been so recognized.*

## XI.

That the "West Side" company, by its representatives and agents, opposed any further legislation and claimed to be the legally designated beneficiary of the grant; that the "East Side" company, by its attorneys and agents, claimed to be the legally designated beneficiary of the grant, and that the "West Side" company was not a corporation and had not been legally designated by the Legislative Assembly, and insisted that some further legislation might be necessary to give the "East Side" company a status in relation to this grant so that the question of whether it had been legally designated by the Legislative Assembly of the State of Oregon might be judicially determined, and so that meantime the grant might not lapse for any possible reason.

## XII.

That thereafter on April 10, 1869, Congress passed an act amendatory of the act of July 25, 1866, the purpose and effect of which was *to permit* the "East Side" company to file assent, and so that, when filed, it should have *the same legal effect as if filed within the time provided by the act of July 25, 1866*, and so that in case the "East Side" company should file such assent, it might have a relation to the Land Department of the United States and a status by which it could be judicially determined whether it was the legally designated beneficiary of the grant, and by which it was provided that *the lands granted by the act of July 25, 1866*, should be sold to actual settlers at quantities not exceeding 160 acres, and in price not exceeding \$2.50 per acre.



## XIII.

That on June 9, 1869, the "East Side" company filed its assent to the act of July 25, 1866, and acts amendatory thereof, including the act of April 10, 1869, and that thereupon and thereafter the Land Department received said filing *and dealt with that company as one of the companies that might ultimately be adjudged to be entitled to the grant.*

## XIV.

That on March 29, 1870, the "East Side" company, for a large and valuable consideration, sold and conveyed to the Oregon and California Railroad Company its railroad, including its land grant, all rights acquired by the "East Side" company under the act of July 25, 1866, and amendments thereto, which was evidenced by a deed of conveyance thereafter duly recorded and thereafter brought to the attention of the United States by filing the same with the Secretary of the Interior; and that from that date up to the present time the Oregon and California Railroad Company has been recognized as the beneficiary of the grant, and as the successor in interest of the "East Side" company, and that all patents which have been issued from 1871 down to the last patent issued, have been issued to the Oregon and California Railroad Company *without any limitation or restriction of any kind*, and that these patents were issued from time to time pursuant to the approval of the reports of Commissioners appointed to examine the constructed road and report upon the same, and pursuant to the recommendations of the Secretary of the Interior, and pursuant to the approval of the

President of the United States endorsed upon each of said several reports, directing that patents issue to the lands opposite to and co-terminous with the constructed portions of the road, the same being evidence of compliance with the terms of the grant, and that these patents were begun as early as 1871, and that since that time the Oregon and California Railroad Company has paid taxes lawfully assessed upon these lands in the sum of \$2,758,094.07, from April 1, 1870, to April 30, 1913.

#### XV.

That the United States had full notice and knowledge during all this time of the way and manner in which the Oregon and California Railroad Company administered the grant, and had full notice and knowledge of the claim made by the European and Oregon Land Company for and in the name of the Oregon and California Railroad Company as to the way and manner in which the "actual settler" clause should be observed.

#### XVI.

Expenditure of more than \$9,000,000.00 in construction of roads from 1870 to 1873—197 miles to Roseburg and 47 1-2 miles to McMinnville. (Subdivision V, Stipulation as to the Facts.)

#### XVII.

Surrender of all the first mortgage bonds and securities and cancellation of same on account of principal and interest due, in May, 1881, by the bondholders, and their acceptance of \$12,000,000.00 preferred and \$7,000,000.00 common stock in lieu of foreclosure,

*thereby making the then purchasers of this stock now owned by the Southern Pacific Company, purchasers in good faith of both land grants as well as both of the constructed lines. (Subdivision VI, Stipulation as to the Facts.)*

### XVIII.

Expenditure of about \$5,000,000.00 additional construction funds secured under the mortgages of June 1, 1881, and May 26, 1883, from June 1, 1881, to January, 1884, in constructing about 145 miles of railroad from Roseburg to a point 1 1-4 miles south of Ashland. (Subdivision VI, Stipulation as to Facts.)

### XIX.

Expenditure of about \$2,500,000.00 between March 28, 1887, and January 3, 1888, in construction of 24,135 miles from a point 1 1-2 miles south of Ashland to the Oregon and California state line, and purchase by Pacific Improvement Company, assignor of Southern Pacific Company of the stock of Oregon and California Railroad Company, and the guaranty of Southern Pacific Company of the principal and interest of the bonds issued under the mortgage of July 1, 1887, and in accordance with Exhibit No. 9 to the Stipulation as to the Facts, Exhibit No. 1 to the Joint and Several Answer of the defendants herein, Exhibit "E" to the Bill of Complaint, Subdivision VII, item 20, Stipulation as to the Facts; said Exhibit No. 9 being the agreement of date July 31, 1885, of Oregon and California Railroad Company and Central Pacific Railroad Company, and said Exhibit No. 1 being the agreement of October 11, 1886, of Central Pacific Railroad Company, Pacific



Improvement Company and Southern Pacific Company and said Exhibit "E" being the agreement of date March 28, 1887, signed by the stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the London Bondholders' Committee, and the Frankfort Bondholders' Committee, the Southern Pacific Company and the Union Trust Company.

## XX.

Expenditure of \$34,784.85 in advertising these lands; \$142,651.40 in examining, cruising and grading these lands; \$145,977.26 in payment of surveying fees to the United States, and in payment of \$1,827,234.10 in taxes on these lands from April 1, 1870, to April 30, 1911. (Answer; defendants' exhibit 289; and testimony of Robert Adams; testimony of J. B. Eddy; and defendants' Exhibits 319, 320, 321, 331, 359; and testimony of P. A. Worthington.)

## XXI.

Expenditure of \$315,828.34 (defendants' Exhibit 288) between 1906 and 1910, and estimated like amount prior to 1906, on so much of this road as lies between Portland and Oregon-California state line (see testimony of C. P. Lincoln, and J. N. Sherburne) all said sums being amount of free movement of traffic for the United States, as required by the Act of July 25, 1866, section 5 (14 Stat. 239); and for the entire line between Roseville Junction and Portland, the amount is *more than* \$1,250,000.00.

## XXII.

Issuance of patents conveying title in fee simple, from 1871 down to 1909, and particularly since the

Act of September 29, 1890 (26 Stat. 496). (See Exhibit 11 to answer, Subdivision XIX, item 3, Stipulation as to the Facts.)

### XXIII.

Modification of the contract contained in the Act of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94) made as to quantity to be entered by homestead settlers under these acts, which modification was made by the Act of March 3, 1879, (20 Stat. 472) by which such homestead settlers could enter 160 acres.

### XXIV.

The Timber and Stone Act of June 3, 1878, (20 Stat. 89) is *an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870.* The General forfeiture act of September 29, 1890 (26 Stat. 496) is an implied waiver of the actual settler clause, in the acts of April 10, 1869 and May 4, 1870. The act of March 3, 1891 (26 Stat. 1097) repealing the pre-emption law is an implied waiver of the actual settler clause of the acts of April 10, 1869 and May 4, 1870 and section 24 thereof (26 Stat. 1193) which authorized the President to set apart as reserve in any state or territory having public lands having forests in any part of the public lands, *wholly or in part* covered with timber or *undergrowth* likewise is evidence of such implied waiver. The act of March 3, 1887 (24 Stat. 56) for the adjustment of land grants is an implied waiver of the actual settler clause of the acts of April 10, 1869 and May 4, 1870. The act of June 4, 1897 (30 Stat 11-36) contained this proviso: "That in cases in which a

tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation the settler or owner thereof, may if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent. Under this statute the Land Department accepted title to 10,376.01 acres sold by the company for \$49,769.56, and by direction of the Attorney General in 1907, after the Department of Justice had begun to investigate these land grants, the Secretary of the Interior suspended selections so pending for 23,012.77 acres sold by the company for \$67,594.69 (See Exhibit 9 to the answer; Exhibit No. 17 to Stipulation as to the Facts.) The sections of the act quoted gave to the grantees of the company the absolute right to relinquish these tracts to the United States and select in lieu thereof any vacant public land. Both the statute and the action of the land Department waived the actual settler clause in the Act of April 10, 1869, and the Act of May 4, 1870. These lands were all within the Cascade Forest Reserve, and this was likewise a waiver of this clause, even if the company had retained the title to these lands.

## XXV.

The Act of February 10, 1909, (25 Stat. 609), the Act of June 17, 1910, (36 Stat. 531), the Act of June 6, 1912, (37 Stat. 123) all amending the Homestead Act of May 20, 1862, (12 Stat. 392) and the due administration thereof applied to the character and class of lands involved in this suit, chiefly valuable for timber and



unfit for settlement, applied to these unsold lands now owned by the company, would prevent the company from further compliance with the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

## XXVI.

The Act of August 20, 1912, entitled, "Public No. 278, H. R. 22002," commonly known as the Innocent Purchasers Act, is a substantial waiver of the alleged breaches of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and is a recognition of the non-settlement character of the lands involved in suit, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were so sold by the company to such purchasers.

## XXVII.

Notice of the construction of the companies placed upon the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and of the purposes of the mortgage of April 15, 1870, and of the intention of the company to mortgage said lands to secure construction funds, as shown by the correspondence, (Government's Exhibits 109, 109-A, 109-B, 109-C,) and which correspondence was brought to the attention of the United States and particularly to the Department of Justice, the Commissioner of the General Land office and the Secretary of the Interior, and

the non-action of the company in respect to the same, and mortgaging these lands to secure construction funds, from May 20, 1872, to April 30, 1908.

## XXVIII.

Notice to the United States and acquiescence in the alleged breaches thereby shown, as contained in the reports made by the Oregon and California Railroad Company, required by law, to the Commissioner of Railroads, transmitted to the Secretary of the Interior and by him to Congress and published in the official documents, showing knowledge of and acquiescence in the alleged breaches in the sale of these lands, in violation of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, from December 31, 1879, down to and including the year ending June 30, 1903. (Subdivision XXI, Stipulation as to the Facts.)

## XXIX.

Notice of the assignment and conveyance of these grants by the deed from the Oregon and California Railroad Company to the European and Oregon Land Company; the Oregon Central Railroad Company, East Side, to the Oregon and California Railroad Company by deed of date March 29, 1870; conveyance of the Oregon Central Railroad Company, West Side, to the Oregon and California Railroad Company by deed of date October 6, 1880, and the various mortgages from the beginning down to and including the mortgage of July 1, 1887, all of which were of record in the office of the County Clerk or County Recorder of Convey-

ances in the various counties in Oregon in which the lands or any part thereof were situated, and all of which were filed with the Secretary of the Interior at or about the time they were executed, or were brought to the attention of the Department of the Interior by requests for re-conveyances and joinder therein by the various trustees under said mortgages, as shown by the evidence and exhibits in the case. This evidence also shows the acquiescence of the United States in the execution of all such instruments.

### XXX.

Exhibit No. 257 which shows conveyances made by the Oregon and California Railroad Company to various purchasers, from 1873 to January 16, 1907, and consideration therefor, showing that the company sold these lands, claiming to hold title in fee simple without particular regard to the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870, unless the same shall be construed to apply to actual settlers on these lands prior to issuance of patents and prior to the acceptance of the completed sections of the road.

### XXXI.

That on March 17, 1870 the Oregon and California Railroad Company was duly incorporated under the laws of the State of Oregon and that by its articles of incorporation it had power and authority to take over and acquire the railroad of the East Side Company and the grant of lands made to it by Act of Congress of July 25, 1866 and the acts amendatory thereof, and that thereafter on March 29, 1870 for a large and valu-



able consideration it purchased and acquired from the East Side Company its railroad and the grant of land *in solido* and has ever since been the owner in fee simple and in possession of that railroad and land grant, excepting such portions of the grant as it from time to time sold, and that as such it completed the construction of the road from the end of the first section of twenty miles to connection with the California & Oregon railroad on the boundary line between Oregon and California, and that it so completed said road after the Pacific Improvement Company had acquired the stock of the Oregon and California Railroad Company and after the Southern Pacific Company had undertaken to finance the construction of said road from a point one and a half miles south of Ashland to the Oregon and California state line.

### XXXII.

That on May 4, 1870 Congress passed an act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon, intending and directly referring to the "West Side Company," and that the "West Side Company" thereafter constructed its road from Portland by way of Forest Grove to a point on the Yamhill River at or near McMinnville, a distance of forty-seven and a half miles.

### XXXIII.

That on October 6, 1880 the West Side Company for a large and valuable consideration sold and conveyed its railroad and land grant to the Oregon and California

Railroad Company, and that the Oregon and California Railroad Company has ever since said date been the owner and in possession of the said railroad and the said land grant, excepting such portions of said grant as it from time to time sold, and that the United States since October 6, 1880 has continuously recognized the Oregon and California Railroad Company as the owner of said land grant and as the successor in interest of the "West Side Company," and that all patents issued for lands in said grant have been issued to the Oregon and California Railroad Company, and that the same facts and circumstances in relation to that grant as related to the East Side grant, so far as notice and knowledge of the United States and administration of the grant is concerned, exist and have existed from that date.

#### XXXIV.

That on January 31, 1885, the Congress of the United States forfeited for failure to construct the road, that portion of the grant of May 4, 1870 between Forest Grove and Astoria, and the United States thereby resumed possession of the said lands so granted and not earned.

#### XXXV.

That pursuant to the Act of Congress approved June 19, 1878 (20 Stat. 169) the grantee companies duly reported as required by said act, the sales of land made by said companies commencing with the half year ending December 31, 1879 and ending with the year June 30, 1903, a period of twenty three years, and in each year reported average price per acre for all sales to date, average price per acre during half year

average price per acre for all purchases to date, maximum price per acre for sales, maximum price per acre then asked, showing continuous and regular excess sales of land in excess of \$2.50 per acre, and that these reports were brought to the attention of the President of the United States and Congress of the United States and the Secretary of the Interior as by law provided and that Congress took no action attempting to forfeit either grant on account of any alleged breach of the actual settler clause of the Act of April 10, 1869 or section 4 of the Act of May 4, 1870, but, on the contrary, Congress on September 29, 1890 passed a general forfeiture act by which all causes of forfeiture as to all the land grants were waived excepting the one cause of forfeiture, *failure to construct*, and forfeited only for this cause lands opposite to and coterminous with the unconstructed portions of said road so unconstructed.

### XXXVI.

That thereafter Congress passed the Act of March 2, 1896 for the adjustment of land grants, and from time to time thereafter continuously by its legislation indicated that Congress did not construe the so-called "actual settler" clause as binding or effective upon the lands involved in suit, or any of the lands granted by the Act of July 25, 1866, or May 4, 1870, or that the so-called "actual settler" clause was a condition subsequent, or that the grants were not being or had not been administered in accordance with the full intent and purpose of Congress.



## XXXVII.

That up to about the year 1887 there was no demand for any of these granted lands excepting in small quantities and for such uses as might be made of them by farmers, settlers or other persons desiring to use these lands for *agricultural purposes*, and that the company sold such lands to such persons, and that there was no substantial departure from the spirit of the actual settler proviso. (Subdivision E, Item 8, subdivision 6, Stipulation as to the Facts, Vol. 4, Transcript of Record, pp. 1565-1566).

## XXXIII.

That for many years and until about 1887, all the remaining lands unsold and involved in this suit were not marketable, were wild, rough and mountainous and had no value for any purpose, and that about said time a demand for timber arose and that thereafter and rapidly these lands became valuable for timber, and that during *all said time they were unfit for settlement, have never been and are not now fit for actual settlement and cannot be used for agricultural purposes*, that their chief value is for the timber and that they could not be used for agricultural purposes excepting after the timber is removed, and such timber could only be removed at very great expense, and that the United States by its Land Department and its legislation has recognized these lands as of the class of timber lands and as not settlement lands, and that during all these times it was impossible for the company to sell these lands to actual settlers," and that the actual settler clause as to the bulk of the unsold lands is impossible of performance and has been made so by the physical conditions and

characteristics of the land *and by the legislation of Congress in that behalf.*

We submit that deducible from these facts the following conclusions of law inevitably follow:

I.

That the United States is and of right ought to be estopped to maintain this suit or to contend that the actual settler clause is either a condition subsequent or a covenant, or to contend that the title to the lands involved in suit is or should be forfeited to the United States for any reason.

II.

That the so-called "actual settler" clause is not a condition subsequent or a covenant or promise in the first instance by the immediate grantees, the East Side Company and the West Side Company.

III.

That this covenant or promise was personal to that grantee and did not run with the land and was not binding upon the Oregon and California Railroad Company, the purchaser from the immediate grantees.

IV.

That the covenant or promise was enforceable by the United States while the Land Department of the United States retained its jurisdiction over the grants *up to issuance of patents for lands opposite to and coterminous with the constructed portions of road and that from that date the United States lost its control and jurisdiction over the lands and could not therefore enforce this covenant or proviso.*

## V.

That these lands remained *quasi* public lands within the jurisdiction of the Land Department and not subject to taxation up to issuance of patent, and that the United States could require the grantee company and its successor in interest *up to issuance of patent to protect the actual settler that might desire to purchase settlement lands within the limits of the grant, and could by its own land department machinery ascertain who was such actual settler and apply the settlement laws to each quarter section that might be settled upon or sought to be purchased.*

## VI.

That when the grantee companies and the Oregon and California Railroad Company, their successor in interest, borrowed money upon bonds secured by mortgages upon these grants, the lands became thereby pledged to furnish construction funds or redeem bonds issued therefor, and that the entire grant in each case may be sold *in solido* to reimburse the bondholders for the construction funds advanced, and that thereby the so-called "actual settler" clause would yield to the prior and paramount purpose of Congress in making the grants in aid of construction of the road.

## . VII.

That by reason of the character of the unsold land, the title thereto cannot be forfeited for alleged breach of condition subsequent for the reason that such condition has become impossible of performance and the condition has been thereby discharged, not only as to major portion of said grant because of its timber char-



acter and because the lands are *not settlement lands*, but every portion of the grant treated as a unit is thereby saved and the title in fee simple remains in the company discharged of any condition if these words may be construed as creating a condition subsequent.

### VIII.

Congress has by its legislation, as before indicated, construed the actual settler clause as applicable only to *settlement lands* and not as applicable to lands of the character involved in suit, and has adopted the construction put upon the Act by the Oregon and California Railroad Company from 1870 down to date, and has by its effective legislation waived any and all causes of forfeiture or all causes of suit for attempted enforcement of the so-called actual settler clause.

### IX.

That the defendants-appellants are entitled to a decree of this court reversing the decree of the court below, dismissing the bill of complaint, dismissing the cross-complaint of cross-complainants and the bill of intervention of the interveners, and adjudging and decreeing that the Oregon and California Railroad Company is the owner in fee simple, in possession and entitled to possession of all of the lands involved in suit, and of all of the lands inuring to the company under the Act of July 25, 1866 and of May 4, 1870, subject to the lien in favor of the Union Trust Company under its Mortgage of July 1, 1887, and subject to such rights as exist under the Deed of Trust of June 2, 1881 in favor of Stephen T. Gage.

We respectfully submit that in view of the foregoing, if a *private party were to stand in this court in the shoes of the United States*, and were to seek forfeiture of lands granted to another private party, which latter party had expended large sums of money for a public purpose, as has been expended here, but had expended them for the benefit of this private party so in court, and had fully performed all of the conditions of the contract other than that the grantee had not sold a portion of the lands conveyed under an actual settler clause such as here, and if that private party had stood by for a period of thirty-seven years and had permitted his grantee to expend large sums of money in taxes, to construct the road, to invest his money that he otherwise would not have invested, to perform continuing obligations upon his part exacted from him by the grantor; if, in other words, this private party had done as the United States has done, if this private party had stood by and had been silent as the United States has done, and been, if this private party had done certain affirmative acts tending to assure the grantee that *his construction of the contract was correct and one that ought to be observed*, would any court of chancery, at any time or place, in any country, allow such party to receive the benefits and consideration of his sale and then take by the stroke of a pen the substantial consideration that he had received from his grantee, deprive him of his estate, continue to require him to perform his contract and do so under the pretense that he

was seeking to perform an act for the benefit of a third person, and at the same time have no intention or purpose to bestow upon such third person the benefit of the forfeiture, applying the case of such private party to the United States in the case at bar? And what greater right, what greater equity as between the Government of the United States and the defendant companies, has the United States than such private suitor under the circumstances stated? Is it necessary that the Government of the United States should be justified in a wrong of this kind? Is it necessary that the Oregon and California Railroad Company should be punished for its construction of this road,—punished for the fact that it kept the contract it made with the United States? Must it be punished by depletion of its estate, after it has paid in taxes vast sums of money which it can never recover, after it has constructed its road, after it has operated it without profit for nearly forty years, maintained it as a public highway, kept its contract to the letter in every particular—merely because, thirty-seven years afterwards the Congress of the United States, in the supposed performance of a public duty, seeks to forfeit this land grant, *not because actual settlers want it, not because actual settlers could use it, not because the United States intends that actual settlers shall have it, but for some other reason—because timber investors desire it, because it desires to penalize the railroad company, or for any reason, good or bad?* It is respectfully submitted that a court of justice should, and that it will not look with favor *upon a suitor that comes into court under such circumstances for such pur-*



*poses and with such ends in view.* It is therefore respectfully submitted that the decree of the court below must and should be reversed.

WM. F. HERRIN

P. F. DUNNE

WM. D. FENTON

Solicitors for Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee.

Defendants-Appellants.

FRANK C. CLEARY,  
of Counsel.

## APPENDIX.

The following are copies of the Acts of Congress to be considered:

Act of July 25th, 1866, 14 Stat., p. 239, the same being—

“An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the “California and Oregon Railroad Company,” organized under an act of the State of California, to protect certain parties in and to a railroad survey, “to connect Portland, in Oregon, with Marysville, in California,” approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within

the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company: Provided, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary



of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of section of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: Provided, That bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: And provided also, That, settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line;

and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, water stations, or any other structures required in the construction and operating of said road.

Sec. 4. And be it further enacted, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been

constructed, and the patents of the lands herein granted shall have been issued.

Sec. 5. And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Sec. 6. And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

Sec. 7. And be it further enacted, That the said companies named in this act are hereby required



to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any state, of competent jurisdiction.

Sec. 8. And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and *all the lands not conveyed by patent to said company or companies*, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. And be it further enacted, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by

the provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Wherever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors, and assigns," the same as if the words had been inserted, or thereto annexed.

Sec. 10. And be it further enacted, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies: Provided, That the term "mineral lands" shall not include lands containing coal and iron.

Sec. 11. And be it further enacted, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

Sec. 12. And be it further enacted, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.

APPROVED, July 25, 1866."

Act of June 25th, 1868, 15 Stat., p. 80, the same being—

"An Act to amend an Act entitled "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon."

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled “An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,” approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, anno Domini eighteen hundred and eighty.

APPROVED, June 25, 1868.”

Act of April 10th, 1869, 16 Stat., p. 47, the same being—

“An act to amend an Act entitled “An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon,” approved July twenty-five, eighteen hundred and sixty-six.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled ‘An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,’ approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the



State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act: Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

“APPROVED, April 10, 1869.”

Act of May 4th, 1870, 16 Stat., p. 94, the same being—

“An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged

in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles; other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

“Sec. 2. And be it further enacted, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of

the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said complected (completed) sections.

Sec. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted



lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the (rate) of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

APPROVED, May 4, 1870."

Act of May 3rd, 1875, (18 Stat. 519), the same being:

“An Act for the relief of settlers on lands within railroad limits.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where any actual settler who shall have paid for any lands situate within the limits of any grant of lands by Congress to aid in the construction of any railroad, the price of such lands being fixed by law at double minimum rates, and such railroad lands having been forfeited to the United States and restored to the public domain for failure to build such railroad, such person or persons shall have the right to locate, on any unoccupied lands, an amount equal to their original entry, without further cost, except such fees as are now provided by law in pre-emption cases; Provided, That when such location is upon double minimum lands, one-half the amount only shall be taken.

APPROVED, March 3, 1875.”

Act of June 3rd, 1878, (20 Stat. 89), the same being:

“An Act for the sale of timber lands in the states of California, Oregon, Nevada and in Washington Territory.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valu-

able chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands, Provided, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: And provided further, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to



purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such

applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of the claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Sec. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on

any lands of the United States, in said States and Territory or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars; Provided, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

Sec. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: Provided, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and condi-



tions as other persons, as provided hereinbefore in this act; And further provided, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

Sec. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED, June 3, 1878."

On May 3rd, 1879, (20 Stat. 472), the same being:

"An act to grant additional rights to homestead settlers on public lands within railroad limits."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new

entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law; Provided, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year.

APPROVED, March 3, 1879.

On January 31st, 1885, (23 Stat. 296), the same being:

“An act to declare forfeiture to certain lands granted to aid in the construction of a railroad in Oregon.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the lands granted by an act of Congress entitled ‘An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,’ approved May fourth, eighteen hundred and seventy, as are adjacent to and coterminus with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal.

under the general land laws of the United States as though said grant had never been made.

Sec. 2. That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, with in six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption, or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefits of these rights: Provided, That the price of the even-numbered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

Sec. 3. That the act of March third, eighteen hundred and seventy-five, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed.

APPROVED, January 31st, 1885."



General Forfeiture Act of September 29th, 1890.

"Act of September 29th, 1890, (26 Stat. 496), the same being:

"An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; Provided, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

Sec. 2. That all persons who, at the date of the passage of this act, are actual settlers in good

Bill S 2301 reported by Mr. Garland from the Committee on the Judiciary on the Senate, January 2nd, 1883, 47th Congress No. 906 (Vol. XIV, pp. 7457-7463, being Defendants' Exhibit 377), the same being:

"A Bill providing for the forfeiture of railroad grants in certain cases."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where grants of lands of Congress have been made to aid in internal improvements, and said lands have not been patented by the United States to the grantee, where the grantee was a corporation, or where the lands were granted to the State, and said lands have been disposed of by the State, and said grants have become subject to forfeiture or resumption by the United States for any cause whatever, it shall be the duty of the Attorney-General to cause suit or suits to be brought in the name of the United States in the proper courts having jurisdiction, to obtain judgments declaring the forfeiture or right of resumption by the United States of such lands, as the case may be, which suit or suits shall be subject to

faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim to said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights.

“Sec. 3. That in all cases where persons being citizens of the United States, or who have declared their intentions to become such in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States,

trial or hearing like other suits, with right or writ of error or appeal by either party, as in other cases. This section shall not be construed so as to prevent the executive authority of the United States from taking possession and disposing of any such lands without judicial proceedings in any case in which it could lawfully do so if this act had not been passed.

“Sec. 2. That the provisions of the first section of this act shall not apply to the case of any railroad (except as mentioned in section three of this act) in which, within one year preceding the passage of this act, any substantial progress in building the same has been accomplished in good faith, and shall be continued in the manner hereinafter mentioned, or in which, before the 1st day of December, eighteen hundred and eighty-two, there shall have been made any substantial progress in the building thereof, and which progress shall be continued in good faith, as hereinafter mentioned. The foregoing provisions of this section, limiting the application of section one of this act, shall cease, determine, and be of no effect in the case of every railroad affected thereby the building of which shall not be in good faith or continued after said first day of December, eighteen hundred and

under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor, and where any such person in actual possession of any such lands and having improved the same prior to the first day of January, eighteen hundred and ninety, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has

eighty-two, to the number of miles in each year required by the act or acts granting such lands, or act or acts amendatory thereof, and in the manner so required, until such railroad shall be entirely completed.

*"Sec. 3. That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by the act or acts granting lands to or in aid or amendatory thereof."*

*"Sec. 4. That in every case in which any corporation, or its lawful successor, being lawfully entitled so to do, shall not do the acts mentioned in section two of this act, it shall be the imperative duty of the Attorney-General of the United States to proceed against it as provided in section one of this act."*

Report No. 2215 of the Committee of the Public Lands, to whom was referred S. No. 2781, "An Act to Forfeit certain Lands heretofore granted for the purpose of aiding in the construction of Railroads and for other Purposes," shows that on April 1, 1890, the Committee reported a Bill on the subject (H. R. No.



been paid, and not more, credited to him on account of and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases and make claim on said lands under the homestead law and as provided in the preceding section of this act; Provided, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: Provided further, That the provisions of this section shall not apply to any lands situate in the State of Iowa on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: And provided further, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress

8919) which had not yet been considered by the House and that in some respects, the two Bills were in substance the same. The Committee recommended the amendment of Senate Bill No. 2781 by striking out all after the enacting clause, and inserting various provisions of the House Bill in the section represented, and as thus amended, the Committee recommended that the Senate Bill pass, which amended Bill so recommended was as follows: (Vol. IV, Defendants' Exhibit 366; Vol. IV, pp. 2019-2027) and is as follows:

#### "AMENDED BILL.

"AN ACT to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Sec. 4. That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby repealed; and so much of the provisions of section four of an act approved June second,

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and co-terminous with the portion of any such railroad not now completed, for the construction or benefit of which lands have heretofore been granted; and all such lands are declared to be a part of the public domain: PROVIDED, that this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted, or lands included in any city, town or village site.

Sec. 2. That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual

eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State,' ' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act of which the same is amendatory.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Washington easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date

settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior will make such rules as will secure to such actual settlers these rights.

Sec. 3. That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor; PROVIDED, That in all cases where parties, persons, or corporations,



were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe

with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: PROVIDED FURTHER, That the provisions of this section shall not apply to any lands (situate in the State of Iowa) on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: AND PROVIDED FURTHER, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.

Sec. 6. That no lands declared forfeited to the United States by

Sec. 4. That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa and for other purposes, approved March third, eighteen hundred and sixty-five, and also section five of an act entitled, 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-four, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid

this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

Sec. 7. That in all cases where lands included in a grant of land to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or upon which there were bona fide pre-emption or homestead claims

in the construction of certain railroads in said State,' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limit of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act to which the same is amendatory.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of



on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed and persons claiming the right to enter as aforesaid may perfect their entry under the law. And on condition that the Gulf and Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands as have been sold, entered, or claimed as aforesaid, then the forfeiture declared in the first section of this act shall not apply to or in anywise affect so much and such parts of said grant of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to or in behalf of said company lands in lieu of those hereinbefore required to be sur-

any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents (\$2.50) per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: PROVIDED, That the rights of way and riparian rights heretofore attempted to be conveyed to the City of Portland in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of

rounded to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

Sec. 8. That the Mobile and Girard Railroad Company, of Alabama, shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles. And the Secretary of the Interior in making settlement and certifying to or for the benefit of the said company the lands earned thereby shall include therein all the lands sold, conveyed or otherwise disposed of by said company not to exceed the total amount earned by said company as aforesaid. And the title of the purchasers to all such lands are hereby confirmed so far as the United States are concerned. But such settlement and certification shall not include any lands upon which there were bona fide pre-emptors or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States.

The right hereby given to the said railroad company is on condition that it shall within ninety days from the passage of this act, by resolution of its board of directors, duly accept the provisions

the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the City of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one, in township one south, of range six east; sections twenty-five, thirty-one, thirty-three and thirty-five, in township one south, of range five east; sections three and five, in township two south, of range five east; section one, in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five, in township one south, of range four east, of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections for the purpose of constructing, maintaining, and repairing a waterpipe line as aforesaid.

Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by



of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title and claim in and to all such lands within the limits of its grant, as have heretofore been sold by the officers of the United States for cash, where the Government still retains the purchase money, or with the allowance, or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or as are claimed under the homestead or pre-emption laws as aforesaid, and the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed, and all such claims under the pre-emption or homestead laws may be perfected as provided by law. Said company to have the right to select other lands, as near as practicable to constructed road, and within indemnity limits in lieu of the lands so relinquished. And the title of the United States is hereby relinquished in favor of all persons holding under any sales by the local land officers, of the lands in the granted limits of the Alabama and Florida Railroad grant, where the United States still retains the purchase money but without liability on the part of the United States.

APPROVED, September 29, 1890.

Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line; and the price of all lands affected hereby and hereby restored when in any way sold is hereby reduced to one dollar and twenty-five cents per acre.

Sec. 7. *That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant."*



Act of March 3, 1887, 24 Stat. 556, the same being:

“An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.”

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, That he has not located another claim or made an entry in lieu of the one so erroneously cancelled; And provided also, That he did not voluntarily abandon said original entry: And provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact that such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the

Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, such lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United



States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Sec. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. Provided, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

Sec. 7. That no more lands shall be certified or conveyed to any State or to any corporation or

individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State corporation or individual would be rightfully entitled.

APPROVED, March 3, 1887."

### ORIGINAL HOMESTEAD ACT.

Act of May 20th, 1862, (12 Stat.392), the same being:

"An act to secure Homesteads to actual Settlers on the Public Domain. . . .

Sec. 2. And be it further enacted, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: Provided, however, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of

such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided by law: And provided, further, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall inure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified. . . .

Sec. 5. And be it further enacted, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the



person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government. . . .

Sec. 8. And be it further enacted, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting pre-emption rights.

APPROVED, May 20, 1862."

### STATUTE OF LIMITATIONS.

Act of March 3, 1891, (26 Stat. 1093), the same being:

"An act to amend section eight of an act approved March 3rd, 1891, entitled 'An act to repeal timber culture laws and for other purposes.'"

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled 'An act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows; etc.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the

passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

APPROVED, March 3, 1891."

Act of March 2nd, 1896, (29 Stat. 42), the same being:

“An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Sec-



retary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant, shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corpora-

tions, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

APPROVED, March 2, 1896."

"An Act to repeal Timber culture laws, and for other purposes," (26 Stat. 1095-1099,) the material part of which is as follows:

"Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. . . . "

Sec. 17. That reservoir sites located or selected under the provisions of 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of 'An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes,' which reads as follows, viz.: 'No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws,' shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person *only agricultural lands* and not to include lands entered or sought to be entered under mineral land laws. . . . . "

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

APPROVED, March 3, 1891."



**FOREST RESERVE LIEU LANDS SELECTIONS.**

Act of June 4th, 1897, (30 Stat. 11-35-36-37) the same being:

“An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, (26 Stat. 1095) the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions: . . . . . The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals. . . . .

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries. . . . .

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or

issuing the patent to cover the tract selected; Provided, further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. . . .

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, . . . any public lands embraced within the limits of any forest reservation, which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. . . .

For surveys and resurveys of public lands, three hundred and twenty-five thousand dollars, at rates not exceeding nine dollars per linear mile for standard and meander lines, seven dollars for township, and five dollars for section lines: Provided, That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the States by the Act approved February twenty-second, eighteen hundred and eighty-nine, and the Acts approved July third and July tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture, and lines of reservations, except that the Commissioner of the General Land Office may allow, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth rates not exceeding thirteen dollars per linear mile, etc., . . . Provided,

That in the States of California, Colorado, Idaho, Montana, Oregon, Utah, Washington, Wyoming, and the Territory of Arizona there may be allowed, in the discretion of the Secretary of the Interior, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth rates not exceeding twenty-five dollars per linear mile, etc.”

### PREEMPTION LAWS REPEALED.

Act of March 3rd, 1891, (26 Stat, 1095), the same being:

“An act to repeal timber culture laws, and for other purposes,” and Section 4 thereof, being as follows:

“Sec. 4. That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, twenty-two hundred and eighty-six, of the Revised Statutes of the United States, and all other laws allowing pre-emption of the public lands of the United States, are hereby repealed, but all bona fide claims lawfully initiated before the passage of this act under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.”



**AMENDED HOMESTEAD LAW.**

Act of March 3rd, 1891, entitled, "An act to repeal timber culture laws, and for other purposes," (26 Stat. 1095) and Section 5 thereof is as follows:

"That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

Reference is made to an Act entitled "An Act to provide for an enlarged homestead" (35 Stat. 639), approved February 9th, 1910, but it is not set out herein. A like reference is made to "An Act to provide for an enlarged homestead" (36 Stat. 531-532) approved June 17th, 1910, but the same is not set out.

The joint resolution under which this suit is prosecuted, approved April 30th, 1908, (35 Stat. 571), is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress,

to wit: 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the Acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hundred and sixty-nine; also 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State,' approved March third, eighteen hundred and sixty-nine; also 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to

assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same: Resolved, further, That the authority and direction hereinbefore given shall extend to any and all suits, actions, or proceedings, which may be instituted or pending under the authority of the Attorney General at the time of the adoption and approval hereof.

APPROVED, April 30, 1908.

The so-called innocent purchaser's act, (37 Stat. 320) entitled "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth," is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of forfeiture heretofore or hereafter asserted by the Attorney General on behalf of the United States in or by any and all suits in equity, actions at law, or other judicial proceedings instituted pursuant to the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth, be, and the same are hereby, ratified and confirmed and are hereby declared to be of the same force and effect as declarations of forfeiture by the Congress of the United States.



Sec. 2. That none of the lands reverting to the United States by virtue of any right of forfeiture thereto as aforesaid shall be or become subject to entry under any of the public-land laws of the United States, or to the initiation of any right whatever under any of the public-land laws of the United States.

Sec. 3. That no suits in equity, actions at law, or other judicial proceedings shall be instituted pursuant to said joint resolution approved April thirtieth, nineteen hundred and eight, that shall involve any lands sold by the Oregon and California Railroad Company prior to April thirtieth, nineteen hundred and eight, unless the same shall be instituted within one year from the date of the approval of this Act: Provided, That this section shall not be construed to apply to any suits in equity heretofore instituted, nor to any parties thereto, nor to any of the lands involved therein, nor to the institution of any further suits in equity, actions at law, or other judicial proceedings, relating to the lands that are involved in said pending suits.

Sec. 4. That the Attorney General is hereby authorized to compromise in the manner hereinafter provided any suit heretofore or hereafter instituted pursuant to the provision of said joint resolution approved April thirtieth, nineteen hundred and eight, involving lands purchased from the said Oregon and California Railroad Company prior to September fourth, nineteen hundred and eight. In any such suit the Attorney General may, in his discretion, stipulate with the defendant or defendants who purchased said lands, or are the successors or assigns of such purchaser or purchasers, that decree shall be entered adjudging

that the lands involved therein have been and are forfeited to the United States. Such decree shall recite that the same was entered pursuant to such stipulation. If said purchaser defendant or defendants, or their successors or assigns, shall within six months from the entry of said decree file with the Secretary of the Interior a certified copy of said decree, together with an application to purchase all of the lands adjudged by said decree to have been forfeited by the United States as aforesaid, and shall pay to the Treasurer of the United States the sum of two dollars and fifty cents per acre for all of the lands so applied for, the Secretary of the Interior shall cause patents to be issued conveying to said purchaser defendant or defendants, and their successors and assigns, all of the right, title and interest of the United States in and to all of said lands; and such purchase shall operate as a compromise of any and all claims of the United States for waste or trespass upon any of said lands committed by such purchaser defendant or defendants or their successors or assigns, respectively: Provided, That the benefits of this section shall not be exercised or enjoyed except in cases where decree shall have been entered pursuant to stipulation entered into as aforesaid: And provided further, That the provisions of this section shall not apply to any lands that have not been patented to said Oregon and California Railroad Company: And provided further, That the aforesaid privilege of purchasing said forfeited lands shall not be exercised or enjoyed as to less than all of the lands involved in said suits, respectively, the purpose hereof being to prevent the elimination from any purchase of any lands from which timber has been

removed or upon which any other waste or trespass has been committed, or the elimination of any part whatever of any land from such purchase.

Sec. 5. That the provisions of section four of this Act shall not be construed to apply to the suit involving approximately two million three hundred and sixty thousand acres, now pending in the District Court of the United States for the District of Oregon, wherein the United States of America is complainant and the Oregon and California Railroad Company, the Southern Pacific Company, Stephen T. Gage, the Union Trust Company, and others are defendants, being designated in the records and files of said court as suit numbered thirty-three hundred and forty; nor shall the provisions of said section four of this Act be construed to apply to any of the lands involved in said last described suit; nor to create any rights or privileges whatever in favor of any of the defendants therein.

Sec. 6. That nothing in this Act contained, nor action taken pursuant to the provisions of this Act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any of said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States.

APPROVED, August 20, 1912."



Code of 1862, in effect when the East Side Company and the West Side Company were each incorporated, is now Section 6678, will now be found in Chapter 1, Section 6679 et seq., Lord's Oregon Laws, and so much of the same as is material is as follows:

“Sec. 6679.

Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act. (L. 1862, D. p. 658, Sec. 1; H. Sec. 3217; B. & C. Sec. 5052.)

“Sec. 6680. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of a deed, and shall file one of such articles in the office of the secretary of state, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall file another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the principal office or place of business is proposed to be located, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall retain the third in the possession of the corporation. (L. 1862; D. p. 658, Sec. 2; L. 1891, p. 110, Sec. 1; H. Sec. 3218; B. & C. Sec. 5053.)

“Sec. 6682. All corporations heretofore incorporated and organized under the laws of this state which have maintained their corporate existence, and are now de facto corporations and engaged in the pursuits for which said corporations were organized, and which have caused their articles

of incorporation to be filed and recorded in the office of the secretary of state or in the office of the county clerk of the county where said company was organized, but which have failed to cause said articles of incorporation to be filed and recorded in both the said places; or, where said articles of incorporation have been filed and recorded, as by law provided, but which said articles were not properly acknowledged, are hereby declared to be legal corporations and are to have the same force and effect as if the same had complied with all the requirements of the law. (L. 1903, p. 176.)

"Sec. 6683. The articles of incorporation shall specify:

1. The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge. (L. 1862; D. p. 659, Sec. 4; H. Sec. 3220; B. & C. Sec. 5055.)

"Sec. 6686. Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and au-

thorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates, and assigns, by the name assumed in said articles, shall thereafter be deemed a body corporate, with power,—

1. To sue and be sued;
2. To contract and be contracted with;
3. To have and use a corporate seal, and the same to alter at pleasure;
4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any state, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation;
5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;
6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company for the transfer of its stock for the management of its property, and for the general regulations of its affairs;
7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a rail



road, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively. Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created; provided, that nothing in this act shall be construed to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad. (L. 1864; D. p. 659, Sec. 5; L. 1878, p. 90; Sec. 1; L. 1887, p. 14, Sec. 1; H. Sec. 3221; B. & C. Sec. 5056.)”

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In the  
**United States**  
**Circuit Court of Appeals**  
**Ninth Circuit**

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Appeal from the District Court of the United States  
for the District of Oregon

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OREGON AND CALIFORNIA  
RAILROAD COMPANY, a corpo-  
ration, *et al.*,

*Defendants and Appellants,*

JOHN L. SNYDER, *et al.*,

*Cross-Complainants and Appellants,*

WILLIAM F. SLAUGHTER, *et al.*,

*Intervenors and Appellants,*

**No. 2400**

VS.

THE UNITED STATES OF  
AMERICA,

*Appellee.*

---

Brief for Intervenors and Appellants, Frank Terrace and each and all of the persons whose names are specifically set forth in the title to this cause, commencing with and including the said Frank Terrace, down to and including John Zoffi, being all of the persons who, by leave of Court, filed their joint complaint in intervention in this cause on the second day of December 1908.

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CHARLES E. SHEPARD,  
*Solicitor for Intervenors and Appellants,*  
*Frank Terrace and others.*

DEAN BURKHEIMER,  
*Of Counsel.*





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CHARLES E. SHEPARD,  
*Solicitor for Intervenors and Appellants,*  
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DEAN BURKHEIMER,  
*Of Counsel.*



## STATEMENT OF FACTS.

On the 25th day of July, A. D. 1866, there was passed by Congress and approved by the President of the United States, an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," which act thereupon became operative and whereby it was enacted in substance and legal effect that the "California and Oregon Railroad Company," a corporation organized under an act of the state of California, and such company organized under the laws of Oregon as the legislature thereof should thereafter designate, were authorized to locate, construct and maintain a railroad and telegraph line between Portland in Oregon and the Central Pacific Railroad in California; and there was to be granted to said companies for the purpose of aiding in the construction of said railroad and telegraph line every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; that there was to be granted to said companies a strip of land 100 feet in width on each side of said railroad track where it passes over the public



lands, including all necessary grounds for stations, buildings, etc.; that whenever said companies or either of them should have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for service, the same having been completed and equipped as provided in said act, then patents should issue to said companies or either of them, for the lands therein granted to the extent of and co-terminous with the completed section of said railroad and telegraph line, and so on in like manner as sections of twenty miles or more should have been completed and equipped, until the entire railroad and telegraph authorized by said act should have been constructed and the patents of the lands therein granted issued; that said companies should file their assent to said act in the Department of the Interior within one year after the passage thereof, and should complete the first section of twenty miles of said railroad and telegraph line within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, 1875; that in case said companies should fail to comply with such conditions by not filing their assent thereto of said act, or by not completing the same as therein provided, then that such act should be null and void and all lands not conveyed by patent to said company or companies, at the date of such

failure should revert to the United States; that the said companies should obtain the consent of the legislatures of their respective states and be governed by the statutory regulations thereof in all matters pertaining to the right of way when not passing through the public lands of the United States (14 U. S. Statutes at Large, p. 239). Said Act of Congress is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 6-13).

On or about the 25th day of June, A. D. 1868, said last described Act of Congress was amended by an Act of Congress entitled, "An act to amend an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon,' " which said amendatory act provided in substance that Section Six of said former act be so amended as to provide that instead of the times fixed in said section, the first section of twenty miles of said railroad and telegraph line should be completed within eighteen months from the passage of said amendatory act, and that at least twenty miles in each two years thereafter, and the whole on or about the first day of July, 1880 (15 U. S. Statutes at Large, p. 80). Said Act of Congress is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 13, 14).

On or about the 22d day of April, 1867, at Salem, Oregon, certain persons, designing to secure the several grants, franchises and other benefits of said Act of Congress, approved July 25, 1866, organized under the general incorporation laws of the State of Oregon, a corporation known as "Oregon Central Railroad Company," having its principal place of business at Salem, Oregon. Said corporation became known as the "East Side Company," and its line of railroad became known as the "East Side Line," and said company and said line of railroad are so designated throughout this record.

On the 20th day of October, 1868, said East Side Company, in furtherance of its aforesaid design procured a joint resolution to be adopted by the Legislature of the State of Oregon, providing in substance that the Oregon Central Railroad Company, a corporation organized at Salem on the 22d day of April, 1867, under and pursuant to the laws of the State of Oregon, be and the same was thereby designated as the company entitled to receive the lands in Oregon and the benefits and privileges conferred by said Act of Congress of July 25, 1866; said joint resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 17, 18). The time within which to file an assent had expired long prior to the designation of said East Side Company



by the Legislature of the State of Oregon on October 20, 1868, as aforesaid. The East Side Company applied to Congress during the session commencing in December, 1868, for an extension of the time within which to file its assent.

On the 10th day of April, 1869, there was passed by Congress an act entitled, "An act to amend an Act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six," in terms as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: *Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said

Act or this amendment be construed to entitle more than one company to a grant of land: *And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre'' (16 U. S. Statutes at Large, p. 47).

On the 8th day of June, A. D. 1869, said East Side Company, through its board of directors adopted a resolution providing in substance that such company, the Oregon Central Railroad Company, of Salem, Oregon, incorporated at Salem, Oregon, April twenty-second, 1867, by such resolution accepts all of the provisions, rights, privileges and franchises of said Act of July twenty-fifth, 1866, and of all acts amendatory thereof, and upon the conditions therein specified, and that such company by such resolution, gives its assent thereto and providing for the notification of the United States through its Secretary of Interior at Washington, of the giving of such assent; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 21-23).

On or about the thirtieth day of June, A. D. 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States a certified copy of said resolution last herein set forth.

On or about the twenty-ninth day of October, A. D. 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States, a map of survey and location of the first sixty miles of its projected line of railroad.

On the twenty-fourth day of December, A. D. 1869, said East Side Company completed the construction of the first twenty miles of its aforesaid line of railroad, commencing at the City of Portland, and on the thirty-first day of December, A. D. 1869, the same was examined and approved by commissioners appointed therefor pursuant to the provisions of Section Four of said Act of Congress, approved July 25, A. D. 1866.

On or about the 17th day of March, A. D. 1870, the promoters, officers and stockholders of said East Side Company, did organize the appellant (defendant) Oregon and California Railroad Company, under the general incorporation laws of the State of Oregon. The principal object of said corporation, as stated in its articles of incorporation, was to become the successor of said East Side Company, and as such, to receive and exercise the grants, franchises and privileges of said Act of Congress approved July 25, A. D. 1866, and the aforesaid acts amendatory thereof; said articles of incorporation



are set out in full in Complainant's Bill as "Exhibit A" (Transcript, Vol. I, pp. 89-92).

On or about the 29th day of March, A. D. 1870, said East Side Company did execute and deliver to said defendant Oregon and California Railroad Company a certain instrument in writing, purporting to assign, transfer and convey to said defendant Oregon and California Railroad Company all of the property of said East Side Company in and to the grants, franchises and other benefits of said Acts of Congress approved July 25th, A. D. 1866, and the aforesaid Acts amendatory thereof; said instrument in writing is set out in full in Complainant's Bill as "Exhibit B" (Transcript, Vol. I, pp. 93-125).

On said twenty-ninth day of March, A. D. 1870, said East Side Company, by action of its Board of Directors and its stockholders, became and was dissolved and since last mentioned date, no corporate powers or franchises have ever been exercised by, or in the name of, said East Side Company.

On the fourth day of April, A. D. 1870, the defendant Oregon and California Railroad Company, through its Board of Directors, adopted a resolution providing in substance that said Company do accept the grant conferred by such Act of

Congress of July twenty-fifth, 1866, and all amendments thereof, and all the benefits and emoluments therein or thereof granted, upon the terms and conditions therein specified; also that such acceptance and assent be filed in the office of the Secretary of the Interior, together with a copy of the deed of assignment from said Oregon Central Railroad Company; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 26, 27).

On or about the 28th day of April, A. D. 1870, the defendant, Oregon and California Railroad Company, filed in the office of the Secretary of the Interior of the United States an authenticated copy of said last described resolution, and a certified copy of said instrument dated March 29, A. D. 1870; and at all times thereafter said defendant, Oregon and California Railroad Company, has assumed and still assumes, to be the successor of said East Side Company and of all of its rights under said Acts of Congress, as aforesaid.

During the period from about the year 1870 until on or about the month of January, 1873, said East Side Line was constructed and extended from said City of Portland, in the State of Oregon, to a point near Roseburg, a distance of approximately one hundred ninety-seven miles (including said first

section of twenty miles theretofore constructed, as hereinbefore referred to).

On or about the 2d day of June, A. D. 1881, the defendant, Oregon and California Railroad Company, executed and delivered to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, as trustees for the owners and holders of preferred stock, so called, of said Company, a deed of trust purporting to convey all of the lands of said grant of July 25, 1866. Said deed of trust is set out in full in Complainant's Bill as "Exhibit D" (Transcript, Vol. I, pp. 134-165); the defendant, Stephen T. Gage, is now the sole surviving trustee under said deed of trust.

On or about the month of June, 1881, the work of constructing said East Side Line was resumed, and thereafter was continued until on or about the month of January, 1884; during said last mentioned period of construction said East Side Line was constructed and extended from said Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately one hundred forty-five miles.

On or about the 12th day of May, A. D. 1887, the defendant Southern Pacific Company, acquired, and thereafter exercised, ownership and control of



the said defendant, Oregon and California Railroad Company, pursuant to a certain contract in writing, entered into between said defendants on or about the 28th day of March, 1887; said contract is set out in full in Complainant's Bill as "Exhibit E" (Transcript, Vol. I., pp. 166-184).

On or about the 1st day of August, A.D. 1893, the defendant Southern Pacific Company, and the defendant, Oregon and California Railroad Company, entered into a contract of lease in writing, whereby all of the railroad and telegraph lines and other property of the defendant, Oregon and California Railroad Company, were leased to the defendant, Southern Pacific Company, for the term of thirty-four years, which lease is still in full force and effect; said lease is set out in full in Complainant's Bill as "Exhibit G" (Transcript, Vol. I, pp. 189-196).

During the year 1887, the last section of said East Side Line, extending from Ashland, aforesaid, to the southern boundary of Oregon, was constructed.

On the 1st day of January, 1903, there remained unsold of said granted lands about 2,373,000 acres, of which 2,080,000 acres have been patented, and 293,000 acres have not been patented.

Prior to the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, had sold certain of the lands granted under said Acts of Congress, in violation of the terms of the proviso contained in the Amendment of April 10, 1869.

Since on or about the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, have refused to sell any of said lands remaining unsold, in accordance with the terms of said grant, or to any persons, upon any condition whatsoever.

Since the 1st day of January, 1903, and prior to the commencement of this suit, each of these interveners has applied to the defendant, Oregon and California Railroad Company, to purchase one-quarter section of said unsold land, as provided by said Act of April 10, 1869, and has tendered full performance of all of the requirements of said Act, each and all of which tenders, offers and applications have been refused by said defendant.

On the 30th day of April, 1908, Congress, by joint resolution, authorized and directed the Attorney General of the United States to institute this proceeding.

On the 25th day of May, 1908, the complainant, the United States of America, filed its bill of com-

plaint in the Circuit Court of the United States for the District of Oregon, setting forth in substance the foregoing facts, and praying as follows:

*First:* That all of the lands in said grant, remaining unsold, be forfeited to the United States, and its title thereto quieted; or

*Second:* That all of said unsold lands are subject to purchase by actual settlers, in accordance with said Acts of Congress, and that receivers be appointed and invested with title thereto, and directed to convey said lands, as required by said Acts; or

*Third:* That a mandatory injunction issue, commanding and requiring the defendant, Oregon and California Railroad Company, to offer for sale, sell and convey said unsold lands, in accordance with said Acts of Congress;

The complaint further prays for other equitable relief (Transcript, Vol. I, pp. 1-540).

On the 2nd day of December, 1908, leave of Court having been theretofore duly obtained, these interveners filed their bill of complaint in intervention, alleging in substance the foregoing facts, and praying as follows:

*First:* That complainant and defendants be



ordered to enter an appearance to said bill, and to answer the same;

*Second:* That a decree be entered, awarding to each of said interveners the land applied for by him, and requiring the defendant, Oregon and California Railroad Company, to execute and deliver to each of said interveners deeds of conveyance of said lands so applied for, upon compliance by said interveners with the requirements of said Acts of Congress, and quieting the title to said land in said interveners, as against all of the defendants;

*Third:* That the defendants be enjoined from exercising any acts of ownership over said lands pending this suit;

*Fourth:* That neither the complainant nor any of the defendants herein, recover any of the lands involved herein and applied for by these interveners;

*Fifth:* For general equitable relief.

On the 2nd day of March, 1909, the interveners, B. W. Nunnally and others, leave of Court being first therefor duly obtained, filed herein their petition in intervention, alleging substantially the same facts as set forth in the bill of complaint in intervention theretofore duly filed by these interveners, as aforesaid, and praying for substantially the same

relief as is prayed for in the bill of complaint in intervention of these interveners (Transcript, Vol. II, pp. 541-639).

On the 14th day of March, 1914, there was filed herein a stipulation entered into between complainant and defendants, defendants-cross-complainants and defendants-interveners; that by the terms of said stipulation it was stipulated and agreed, among other things, that it should not be necessary to include in the printed record of this cause any of the papers or proceedings pertaining to any of the interveners, other than B. W. Nunnally and others (Transcript, Vol. XVI, pp. 8652-8664). For this reason, the complaint in intervention of these interveners is not set out in the transcript.

On the 7th day of April, 1909, there was filed the joint and several demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bills in intervention of all of the interveners herein, including these interveners, upon the grounds:

*First:* That the bill does not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars;

*Second:* That said bill does not show any cause or equity entitling the interveners to maintain their suit;

*Third:* That the bill does not show that the interveners are entitled to a discovery;

*Fourth:* That the bill does not show that the interveners are entitled to any relief (Transcript, Vol. II, pp. 685-687).

On the 24th day of April, 1911, said demurrers were duly presented and sustained by the Court (Transcript, Vol. II, pp. 694, 695).

On the 9th day of June, 1913, the complainant filed its several motions to dismiss the bills of complaint in intervention of all of said interveners, including these interveners, for want of equity in such bills, and said motions were, on the 1st day of July, 1913, sustained by the Court (Transcript, Vol. III, pp. 1286, 1287).

On the 23rd day of June, 1913, the Union Trust Company, individually and as Trustee, filed its motion to dismiss the complaints in intervention, including the complaint of these interveners, and said motion was, on the 25th day of June, 1913, sustained by the Court (Transcript, Vol. III, pp. 1290-1292).

On the 1st day of July, 1913, the defendants, Oregon and California Railroad Company, Southern



Pacific Company and Stephen T. Gage, individually and as Trustee, filed their motion to dismiss the bills in intervention of the interveners, including these interveners, and on the 10th day of November, 1913, said motion was sustained by the Court (Transcript, Vol. III, pp. 1293-1295).

On the 1st day of July, 1913, the complainant and defendants having adduced their evidence, a decree was entered by the Court, forfeiting all the lands involved in this proceeding, including the land claimed by these interveners, to the United States of America, and quieting the title to the same in the complainant, and enjoining these interveners and all other parties herein from claiming any interest therein.

From the orders and decrees entered in favor of complainant, all of the defendants, cross-complainants and interveners have prosecuted a joint appeal, and from all orders and decrees entered in favor of the defendants against the cross-complainants and interveners, the cross-complainants and interveners have prosecuted a joint and several appeal.

## ASSIGNMENT OF ERRORS

(Numbers in brackets are the numbers of said assignments as they appear in the Transcript, Vol. XV, pp. 8283-8391).

1. (51) The court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bill of intervention of the intervener, Frank Terrace, and the other interveners with him in his said bill joined, for want of equity in said bill.

2. (52) The court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as trustee, to the bill of intervention of said interveners, for want of equity in said bill.

3. (53) The court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

4. (54) The court erred in sustaining the motion of the defendant, Union Trust Company,

individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

5. (55) The court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill.

6. (56) The court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to answer said bill in intervention.

7. (57) The court erred in not requiring the Union Trust Company, individually and as trustee, to answer said bill in intervention.

8. (58) The court erred in not requiring the complainant to answer said bill in intervention.

9. (59) The court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill.

10. (60) The court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations



and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them respectively in said bill.

11. (251) The court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them respectively.

12. (254) The court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As, their said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling these interveners and cross-complainants and each of them, to equitable relief; and

Said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

13. (255) The court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands

sought to be purchased by the interveners and cross-complainants herein or any of them.

14. (259) The court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

15. (260) The court erred in holding that the proviso in the said act of April 10, 1869, was a condition subsequent.

16. (261) The court erred in holding that the proviso in the amendment of April 10, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed \$2.50 per acre, was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

17. (272) The court erred in holding that there was jurisdiction in the court on the equity side to decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed

condition subsequent in the proviso contained in the Act of April 10, 1869.

18. (277) The court erred in holding that by its joint resolution of April 13, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize or empower the court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the Act of April 10, 1869.

19. (287) The court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

20. (296) The court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

21. (304) The court erred in holding that the United States, complainant herein, was entitled



to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the Act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

22. (316) The court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

23. (317) The court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by each respectively, upon payment of the purchase price therefor.

24. (318) The court erred in not holding that the defendant, Oregon and California Railroad

Company and other defendants claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

25. (324) The court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, respectively, as prayed for in their several bills.

26. (325) The court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforceable by the interveners and cross-complainants.

27. (326) The court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

28. (331) The court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

29. (332) The court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

30. (334) The court erred in holding that the proviso in the Act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

31. (337) The court erred in not holding that the proviso in the Act of April 10, 1869, for the sale of lands to actual settlers was intended by



Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

32. (338) The court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

33. (340) The court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settlor of the trust in said lands.

34. (348) The court erred in holding that the United States, complainant herein, had any

right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action, except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands.

35. (350) The court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this

suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government, cannot be had.

36. (353) The court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

37. (354) The court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

38. (355) The court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

39. (359) The court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.



## ARGUMENT

THE ACT OF APRIL 10, 1869, BY THE TERMS OF THE PROVISIO RESTRICTING SALES CREATED A TRUST.

Due regard to the rights of the interveners whom we represent does not require us to follow step by step the elaborate course of reasoning employed in behalf of the Government by its counsel. With a large part of that reasoning and of the discussion of the land grant policy of the United States, its origin and history, and of the discussion of statutory construction in general, we cordially agree. Indeed, it is only when the counsel for the Government reaches the point of arguing that the proviso created a "*condition subsequent*," entailing forfeiture of the title of all lands not previously sold within the terms of the proviso, that we part company with him. Of course this acquiescence up to that point in the Government's contention, is in view of its brief in the court below. What other or different view, what other or different reasoning, authorities or conclusions its brief in this court may set forth we have no means of knowing at present.

We agree, then, with the learned counsel for the Government that the Act of April 10, 1869, in

general, and its additional proviso amendatory of the Act of July 25, 1866, in particular, expressed a definite intention and policy of Congress; that they were meant to effectuate that intention and policy; that the amendatory proviso was not a mere “unenforceable, directive, regulative covenant;” that it was not a bare *brutum fulmen* of that character, not a counsel of perfection or ethical admonition to be good addressed to a group of selfish promoters more intent on gain than on settlement of the wild country which their railroad was to open up—in short, that the statute and the proviso *meant something*. The sole questions between us and the Government are: What did they mean? And, How is that intent to be realized in act?

Notwithstanding the abundant litigation over land grants and the titles derived from them, lawyers and judges schooled in the common law are very apt to approach a case involving estates and rights originating in a public land grant with the prepossessions derived from the technical logic of the common law. A remarkable instance of that mental attitude is shown in the laborious argumentation as to the construction of the proviso herein as a “condition subsequent.” In reading the alleged “demonstration” that it is a “*condition subsequent*”, and is and can be nothing else, we are

transported into the atmosphere of the courts when Coke and Holt and Hale sat on the bench, when the feudal law of land was the sole guide to litigants, and before Mansfield had opened the windows and let in the daylight and fresh air of the modern world. And yet the whole law of land grants—a large and important branch of our public land law—is based on a departure from the old common law of estates, with its feudal rigidity of logic and technicality of terms. For its cornerstone is the doctrine of a grant *in praesenti* of vast tracts indefinite in location and area—a “float”—which by later relation becomes defined—the “float” gets anchored—by the co-operating yet independent acts of the railroad surveyors in locating and mapping the road, the federal surveyors in running out the public survey lines on the face of the globe, and the department officers in issuing the patents. Anything so vague, so absolutely indeterminate as an estate of many thousand acres, of not one square rood of which could it be said at the date of the grant, “this is a part of it”, would have been scouted in any common law court as void for uncertainty. Without this liberal and modern view of the land grant acts, treating them not only as statutes but as conveyances of a floating estate to be afterwards tied down to a local habitation, we should have had (on strict com-



mon law principles) only a statute inoperative, hence void, *as a grant*, and later sundry patents which would have been the real and only source of title. And these patents, containing no restrictions in terms of the patents, would necessarily vest an unrestricted estate in fee simple in the grantee railroad company. Hence it is only by virtue of the modern doctrine that the land grant act is a floating conveyance, to be later made definite, that the learned counsel is able to tie the "condition subsequent" to the estate as a qualification of the fee. He stands, then, with one foot on the modern land grant doctrine to get his *pou sto*—his foothold to argue that there is any limitation on the estate; and having got that, he shifts to the other foot and stands on the most rigid construction of this proviso as a condition subsequent, in order to defeat the granted estate.

Nor does the inconsistency of the complainant's case end here. For it comes into a court of equity to enforce the technical construction of a clause of ambiguous meaning. Now no one doubts that courts of equity in the cases cited in the Government's brief and in other cases have enforced forfeitures. Nevertheless, it is a commonplace that equity abhors forfeitures. Whether in a given instance equity will permit or refuse a forfeiture depends not so much

on general doctrines as on the circumstances, as they appeal to the chancellor's conscience or repel it. In many cases, the court has said it will leave the complainant to his legal remedies; in others, that it will grant the forfeiture. On what does the difference depend? How is this wide judicial discretion to be guided? The difference depends on other fundamental notions of equity, such as: "He who seeks equity must do equity", and "Equity will protect the rights of all and do complete justice", and "Equity favors the diligent". And the chancellor's discretion is to be guided by the light thrown by the conduct of the parties, their rights and wrongs, the mischiefs and losses that will be avoided or caused by the one or the other ruling. It cannot, then, be said in a court of equity, as in one of law, that (granting the technical elements of a forfeiture), the forfeiture will be enforced as of course. "It all depends."

We must approach the subject of the proper construction of the proviso, bearing in mind that we are not dealing with the technical purport of a clause in a common law conveyance, but with the true intent and effect of an integral part of a scheme of disposing of vast areas of public lands in an uninhabited wilderness; that such scheme and every part of it must be viewed in the light of the history

of a half century of legislation by Congress and of settlement of the "great West"; that while the words are those of Congress, their intent and effect are what the court can say they are, and the court is not to abnegate its function and accept what this committee may have reported or that congressman—even an able land lawyer—may have said they are. And above all we are to remember that this is only a single instance in a great land grant system which was utterly severed from the technical doctrines of common law estates by the doctrine of a "float" which the Supreme Court worked out *and which is the foundation stone of all land grant estates*, and that *in this court* we are to seek not the *rigor and vigor* of legal terms, conditions and estates, but broad equity and complete justice among all parties.

We maintain, then, *that the proviso in the Act of 1869 created a trust.*

What are the elements of the trust?

They are all contained within the terms of the land grant in the Act of July 25, 1866, as qualified by the amendatory proviso in the Act of April 10, 1869:

"Provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not exceeding one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre."



“The act aforesaid” means the Act of July 25, 1866.

Since there are no express words of trust, this is *an implied trust*.

1 *Perry on Trusts* (6th Ed.), Secs. 24, 25, 112.

*Lane vs. Lane*, 8 Allen, 350.

No particular form of words is required to create a trust. As to express trusts, “there is no particular formality required or necessary in the creation of a trust.”

1 *Perry on Trusts* (6th Ed.), Sec. 82;

*Tyler vs. Tyler*, 25 Brad. (Ill.) 339;

*O'Rourke vs. Beard*, 151 Mass. 9;

*Gisborn vs. Charter Oak L. Ins. Co.*, 142 U. S. 326.

“Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed **THROUGH THE MEDIUM OF A TRUST.**”

1 *Perry on Trusts* (6th Ed.), Sec. 112;

*Lane vs. Lane*, 8 Allen, 350.

“Courts of equity will imply a trust from the contracts of parties, *although there are no*

*words of trust in the instrument*; as if a person for a valuable consideration agrees to settle a particular estate upon another, *or if he agrees to sell an estate to another*, the settlor or vendor becomes a trustee of the fee for the purposes of the settlement or for the purchaser."

*Perry on Trusts* (6th Ed.), Sec. 122.

The creation of a trust may be shown by the correspondence and agreements of the parties.

*Loring vs. Palmer*, 118 U. S. 321;

*Dorr vs. Clapp*, 160 Mass. 542;

*Hutchins vs. Van Vechten*, 140 N. Y. 119;

*Gates vs. Avery*, 112 Wis. 277.

And it has been expressly held by the United States Supreme Court that no technical language is necessary to the creation of a trust; and a devise accompanied by words imperative, expressing a wish or recommendation that the devisee will apply the property to the benefit of others, may create a trust.

*Colton vs. Colton*, 127 U. S. 300.

See, also,

*Russell vs. U. S. Trust Co.*, 127 Fed. 446;

*McDuffie vs. Montgomery*, 128 Fed. 108;

*Burnes vs. Burnes*, 137 Fed. 793;

*Collister vs. Fassit*, 163 N. Y. 289.

Nor can there be any doubt that the United States can create a trust—as indeed it has often

done. As an incident of its sovereignty, it can dispose of its property in any mode which the Congress in the exercise of its legislative judgment may deem for the public interest; and it can attach to its gift or sale of the public lands any legal or equitable qualification which it chooses to impose. Therefore, "the state itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees; and such trustees are equally amenable to the jurisdiction of chancery."

1 *Perry on Trusts* (6th Ed.), Sec. 30;

*Buchanan vs. Hamilton*, 5 Ves. 722;

*Comrs. vs. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433.

Sundry instances of such federal grants of public lands in trust exist, of which we cite only two as illustrations.

The sixteenth section in every township, not sold or otherwise disposed of, and in such case other land in lieu thereof, was granted to the future State of Wisconsin in the enabling act.

*Beecher vs. Wetherby*, 95 U. S. 517.

Certain public lands were granted to the future State of Montana for a normal school, in the enabling act.



*Montana ex rel. Haire vs. Rice*, 204 U. S. 291.

In each case the grant was treated as a trust, although when the act was passed the state had not come into existence.

We have, then, a competent creator or “settlor” of a trust; and it is immaterial whether such creator is to be considered as a donor or a vendor of the property conveyed, because it was vested with the sovereign power either to give or to sell its own. And we have a form of words—a phraseology—which can be construed as creating a trust if the court finds in the words and the concomitant circumstances the intent—since no technical or precise form of words was required, and the whole case turns on the question of intent. We freely admit that it is also possible to extract the legal essence of a “condition subsequent” from the same words—the proviso—because the very question before the court, and the only question on which the interveners’ rights depend is: Was the proviso a *condition subsequent* or a *trust*?

The Supreme Court of New Hampshire, after stating a case involving a donation to a city “upon condition” of a certain perpetual use of the premises, said:

“It would seem, therefore, that the question whether the conveyance was upon condition

subsequent or not was wholly *one of construction*, and that its answer was to be found in *the ascertainment of the intention of the parties* as expressed in the deed and the contract in pursuance of which the conveyance was made.”

*Ashuelot Nat. Bk. vs. Keene*, 74 N. H. 148;  
65 Atl. 826.

The exact situation here could not be more clearly or tersely put.

It will, no doubt, be argued by opposing counsel for both the Government and the railroad company that the fact that Congress can create a trust and that it adopted a form of words which are capable of construction to that result is very far from showing that a trust did ensue. We readily admit it; all we have said hitherto is only preliminary, and goes to show that the circumstances do not debar that conclusion.

Naturally, the learned counsel for the United States spent by far the larger and stronger part of his brief below on his attack on the railroad company's position that the proviso was only “an unenforceable, directive, regulative covenant.” Inevitably so; for if the court adopted the company's theory, the company would remain sole master of the field, and neither the Government nor the interveners would retain any standing in court or any enforceable rights. The Government's argument against the

covenant theory is therefore in our interest as well as its own. But its counsel has paused in his attack on the covenant theory long enough to criticize the trust theory, because of the proviso's "restraint upon a distrusted grantee having an adverse interest," indefiniteness of the beneficiary, and uncertainty of the terms of the supposed trust.

With the possibility of a trust, therefore, in the existence of a competent settlor and an instrument construable as creating a trust, we proceed to consider whether that construction can and should be placed on the instrument—the Act of 1869—or in other words, whether the other elements of a trust are found therein.

What are those other elements of a trust? They are:

1. A trustee.
2. A trust fund or estate.
3. Beneficiaries.
4. A duty of the trustee as to the trust estate.

1. *A Trustee.* It will not be disputed that we have here a corporation competent to take and act as trustee. Any legal person capable of receiving the legal title may be made a trustee.



1 *Perry on Trusts* (6th Ed.), Secs. 39, 42, 43;

*Jones vs. Habersham*, 107 U. S. 174.

Judging from the brief of counsel for the Government in the court below, the only points that will be made in this court on the capacity of the railroad company to act as trustee are that, being entitled to retain for its own uses in the construction of the railroad the proceeds of sales up to \$2.50 per acre, it could not be both trustee and beneficiary; and that its interest was adverse and it was therefore distrusted by Congress.

If the railroad company were to be the sole beneficiary of the trust, the inference of a trust from other facts would fail, because by the instant union of the legal and equitable estates when the title in fee vested in the company the trust would never come into being.

1 *Perry on Trusts* (6th Ed.), Sec. 347.

But this rule is limited to instances of exact identity of the entire estate meeting simultaneously in both trustee and *cestui*; and one *cestui* out of a number or a multitude who are to benefit from the trust estate may be the trustee for himself and for all the others without impairing the trust.

*Burbach vs. Burbach*, 217 Ill. 547;

*Nellis vs. Rickard*, 133 Cal. 617;

*Story vs. Palmer*, 46 N. J. Eq. 1;

*Robertson vs. De Brulatour*, 188 N. Y. 301;

*Losey vs. Stanley*, 147 N. Y., 560.

See,

1 *Perry on Trusts* (6th Ed.), Secs. 59, 297, 347.

2 *Id.*, Sec. 476a.

There is, then, no inherent capacity of the company to act as trustee, and no consequent invalidity of the trust, arising from the fact of the company's beneficial interest, viz: its right to retain the entire proceeds of sales made under the terms of the proviso.

But it has also been argued below and will be argued again at this bar, that Congress cannot have intended a trust, because it had no confidence in its grantee, the railroad company; that previous experience with railroad land grants and their grantees had been unfortunate and destructive of public confidence in the good faith and honor of the promoters of such enterprises; and that since the company had an adverse interest Congress would not entrust to it an imperial grant under the terms of a *trust*, but would do so under pain of a *total forfeiture* if it broke the terms of the grant.

Now there is not the least evidence of any distrust in Congress of this particular company. It is quite true that by 1869 experience with the railroad land grants, especially the transcontinental ones, had shown that the earlier legislation had not sufficiently hedged about their disposal so as to insure their two main objects—the construction of the roads and the settlement of the country. But it must be borne in mind that at that time the railroads which were opening the great western country, and abolishing the perils, losses and expense of overland or ocean travel to the Pacific Coast were regarded as public benefactors, not public enemies; and that the present baiting of all public service corporations had not become the vogue. A wise caution to safeguard a grant, not a deep distrust of the grantee as a villian, was therefore the rational attitude of Congress and the nation; and all the circumstances must be looked at in that *natural* light; not in the present lurid light of the fires of political frenzy. That, indeed, is one of the primary rules of construction of transactions many years past, because it is a prime rule of historical criticism—to view the case by the light of *that* time, not of *this*. So viewed, we can see that if Congress distrusted the company so deeply as the Government's counsel would make it appear, that was the strongest reason



for refusing the grant *in toto*, not for granting it on penalty of loss. For if the company could not be trusted at all, and if it violated the condition it would be sure to lose the grant sooner or later, and thus the very thing that the counsel puts forward as the primary object and motive of Congress—the settlement of the country in small tracts for agriculture—would fail. This vast grant, or some large part of it would thus be thrown back into the general domain of the public lands without the advantage of segregation and improvement as farms, and of promotion of the same diverse ownership of the alternate government sections. And, moreover, the other main object of the land grant—construction of the road—to the extent of a forfeiture would fail or at least be crippled. Such distrust, then, as is now asserted, if expressed in the form of a condition subsequent would defeat the very objects that inspired the grant. On the other hand, the company's interest in the proceeds, its right to retain them for building the road, would no more militate against *entrusting* the grant to the company, than against a pure and unhampered donation of it, as in the Union Pacific and other grants. Many instances have occurred, many must have been known to the lawyers then in Congress, where a distributive part of a trust fund or income went to one or more

trustees. The authorities above cited show there is nothing inherently vicious or fatal to the idea of a trust in participation by a trustee in its benefits. That fact of itself, then, did not hinder Congress from creating a trust, and it does not forbid the construction we contend for. It leaves the subject, as before, open to the construction demanded by all the circumstances.

But the Government's counsel argues that it could not have been the purpose of Congress to commit to a party having a known adverse interest the discharge of a trust involving several million acres of public lands, and to do so in the form of a restraint.

The fallacy in this argument lies in assuming that the company's interest was adverse in the sense intended; and then on the basis of this assumed hostility, which contradicts a relation of confidence, in arguing that a trust cannot be inferred from words of restraint. In a bargain of sale the interests of vendor and vendee are so contrary that they are commercially hostile. And in fiduciary relations generally the law will not permit one to act where his self-interest conflicts with his fiduciary duty and interest. But we have no such case here. The situation was this: vast tracts of wild land, almost every acre owned by the Government; pressing need

of a railroad as the only effective means of opening and settling the region within reasonable time; a prior land grant in aid of the railroad offered but lapsed; and a new applicant for the grant. Thereupon Congress says to the applicant: "The country needs the railroad; we want to help you build it so as to induce sales to actual settlers on both what we give away and what we keep. We will give you one-half the land for twenty miles on each side if you will build the road and will sell the land to actual settlers in quarter section tracts or less at not over \$2.50 per acre. You are to keep the money and use it to build the road." The company then said: "Agreed. We will accept your deed on those terms, and will sell the land thus and so." The Government had three distinct motives or interests: (1) To get the road built as the only feasible means to its ultimate end, viz: (2) To get the country opened and cultivated by actual settlers on the railroad land, which would aid it (3) To sell its own land at like reasonable prices to actual settlers. The railroad company had three distinct motives or interests: (1) To get the aid of the land grant; (2) To convert the land into cash in order to build the road; and (3) To get the country settled—both the granted lands and the reserved public lands—in order to increase railroad traffic. None of the com-



pany's motives antagonized any of the Government's; on the contrary, they largely concurred. Fidelity to each interest of its own by each party promoted the success of the other interests of itself and of the other party. The fact that the company was limited as to sales did not create any antagonism or inconsistency with a trust. Restraint does not spell hostility. In the vast majority of trusts there is some limitation of the trustee's powers, either as to the fund, its use, sale, etc., or as to the *cestui*, when and how he is to receive the benefit, etc. There is a positive and a negative side to every direction to a trustee. A provision that the income to be paid to A quarterly forbids it to be paid to B at all, or to A only annually. A provision (or "command" if the Government's counsel prefers the word) that land be sold only to actual settlers in quarter-sections or less at not over \$2.50 per acre, is a prohibition not to sell to non-settlers in township tracts at \$5.00 per acre—or for that matter at ten cents an acre. The fact that the positive term has a negative obverse does not debar the transaction from being a trust. For if that were the case most trusts would fail, and become strict estates on condition, by parity of reasoning. And the restraints drawn in three directions leave ample liberty in the trustee *in the very line of both its own and its*

*grantor's interest.* For the maximum price limit was the same as the maximum price of Government lands to settlers then; and the maximum quantity was the limit of agricultural lands under homestead or pre-emption lands; and actual *bona fide* settlers were the only class allowed by law to acquire public lands. Hence there was no restraint that would hamper the railroad in attracting buyers, or would drive incoming settlers to take up public lands in preference. Quite the contrary, the company had the advantage, in that it was free to bargain for a less price and to sell parcels irrespective of lines of public survey; while the Government land officials were bound by the cast-iron rules of the statute and the land office. The limits drawn were reasonable *and tended to realize the interests of both parties.* They were elastic and left a wide discretion to the grantee in trust. They were practical as based on previous experience in settling public lands, and yet preventing a dishonest diversion by sales to syndicates and "rings" and by withdrawal from the market. Every sale made within the terms furthered all of the interests of both the creator and the trustee of the trust. Any refusal to sell on those terms, any sale in breach of those terms ran counter to all those interests. Therefore the interests of both parties co-operated in a faithful performance of the trust;

and there was no antagonism unless every trustee is *ipso facto* an enemy of the settlor of the trust.

2. *A Trust Fund or Estate.*

3. *Beneficiaries.*

In view of the objection of indefiniteness to the trust theory, we deem it best to discuss these two elements of a trust together.

The objection that the fund or estate was too indefinite to become the subject of a trust when the Act of April 10, 1869, was enacted, and hence the trust did not come into existence and attach itself to the land, will probably not be seriously pressed. For, to urge that point on the part of either the Government or the railroad company would cut the ground from under the objector's feet. On the part of the Government, because, as we have already shown, it gets its standing to argue the condition subsequent theory only by virtue of the doctrine of a grant *in praesenti* in the Act of 1869 to which the proviso attached itself as a condition, although the land was not yet identified. And on the part of the company, because it applied for and obtained patents years later by virtue of that same act when the progress of construction had identified the lands as due to it. Yet we may pause a moment or two to consider the bearing of that *in praesenti* doctrine



as fixing by relation a floating grant. For it is so utterly abhorrent to all common law doctrine of estates, that the two cannot stand in any harmonious relation. The feudal law of estates grew up in a land where boundaries, estates and titles were settled, and no public land in our sense existed; the doctrine of a floating grant had to be contrived, without precedent, to meet the novel situation of a country with vast tracts of wild lands, unsurveyed, unsettled, in a legal sense without a past. That doctrine bears the signs of an equitable rather than a legal origin. Like many doctrines and remedies invented by the English chancery it sprang from the necessity of the case to supply a defect of the law in a novel state of facts. The "relation" between the later patent and the earlier grant is simply the maxim: "Equity will regard that as done which ought to be done" put into effect. Now this equitable origin of a settled rule of our public land law makes it easy to see that the same result should ensue as to a trust in a floating land grant. For by parity of reasoning the trust is a "float" as to the precise land it covers so long as the subject of the grant remains indefinite; and as soon as that becomes defined by approved lists in the General Land Office, or by patents issued therefrom, the floating trust, like the floating fee, becomes attached to the land.

This explication is perhaps unnecessary for the sake of the conclusion, which will hardly be denied, that the trust becomes definite, and relates back to its origin, as soon as the grant becomes definite. But it is of value as showing that not only as to the legal fee, but as to the equitable estate and all the incidents of a trust, we are on another plane, we breathe another air, we have different criteria from those of the older estates and the stricter trusts pertaining to them.

For if grants of such magnitude, under such novel circumstances, must be dealt with more liberally, freed from technical rigor of the common law, surely in a court of equity, on a subject solely of equitable origin—a trust—we may apply the same liberal notions.

With this standard of criticism we can now take up the objections to the indefiniteness of the beneficiaries, and of the beneficial interest created in them.

It cannot be denied that in ordinary private trusts the beneficiary must be definitely identified by the terms of the trust, while in charitable trusts the opposite holds—the trust instrument must indicate not individuals but classes, and all those who fall within the class are beneficiaries, entitled to par-

take. But just as with the floating grant, as a title in fee, so this provision that the lands "*shall be sold to actual settlers*" creates a novel kind of trust, neither private nor charitable, but in the nature of each. Like a private trust, it is not actuated by motives of sheer philanthropy, religion or benevolence. Like a charitable trust, it is offered to all who can bring themselves within the class named. To avail oneself of it is optional, but anyone who becomes or is ready to become an actual settler, when the railroad company will let him go on the land, thereby identifies himself as a beneficiary. "That is certain which can be made certain." Such an one is a person pointed out by the statute as one to whom the land "*shall be sold.*" There is, then, a definite beneficial interest fixed in a designated *locus*, parcel of the granted estate, and inhering in a definite person as soon as he by proper acts of selection, tender of cash and offer to settle brings himself within the class. The very fact that any one whosoever (having the proper qualifications), so to speak, can precipitate upon himself this inchoate or floating right, and make it fixed and vested in him, shows "an intention to create a beneficial interest." That Congress held out the offer and required the company in accepting the grant to hold out the offer to anyone to bring



himself within the favored class proves that Congress meant to attract takers, and to give them the right to insist on taking the prize. The company, therefore, received and held the prize, be it worth more or less, for those who proved the right to take it. *In short, it held it in trust for them.* The so-called "restraint" on the company was not so much that as it was a limitation of the class of individuals to whom the offer was open. It was just like the analogous terms of the pre-emption and homestead laws. All who choose, and who meet certain tests and do certain things, can acquire so much land where they choose. When one meets the tests and does the things he gets a vested right—*an equitable title in fee*—and the federal judiciary will protect it against the whole power of the General Land Office or of Congress.

When a given thing is the subject of sale but the owner has the option to say whether he will sell it to a given person or to any one of a given class, or at all, he cannot be said to hold it in trust for one who offers to buy and tenders the price. But if the option is in one of a given class to buy at a named price, and the owner has agreed to sell at that price to him who tenders it, he has put himself under bonds to sell. He holds in trust for the proposed vendee.

If he is forbidden to sell to any other one, or to one not of a named class, *it is only that he may hold the trust estate for him who fastens thereon his equitable right to it.* This is no more than the commandment expressed or implied in every trust, *that the trustee shall hold the fund for, and not divert it from, the uses of the trust.* The absolute owner is free to sell or not at his own choice. The owner under terms to sell to certain persons named or to be named is bound to sell accordingly; and that is a trust.

So much for the clause (or “restraint,” if you will) as to “actual settlers.” The other two clauses about quantity and price need not detain us long.

The elastic or discretionary range of area and compensation seems to the counsel for the United States inconsistent with the idea of a trust. The objection comes with ill grace from one who has labored the point that a restraint within a class, or a prohibition to sell outside of a class, does not consist with a trust. He first says it is not a trust because the company cannot sell to any one it chooses, and next he says it is not a trust because the grantee can sell to A one parcel of ten acres at \$2.50, and to B another parcel of one hundred sixty acres at \$1.75, if it thinks those are the best prices it can get for those particular parcels. But

no inconsistency exists. Each limitation in class, area and price, only aids the object of Congress to get the road built and the land occupied. As to the *class*, there must be an inflexible rule. No gradation can exist. Settlers do not shade off into near-settlers, part-settlers, and so on. A man and his family are either "actual settlers" or absentee owners. And the very thing that costly experience had shown was that absentee ownership was fatal to the whole scheme of development by railroads and land sales. But as to *area* and *price*, it is quite otherwise. Infinite gradations are inherent in their nature; they have been potentialities in numberless land sales ever since Abraham bought the cave of Macpelah for a family burial lot. The final result is a balance between the needs and wishes of the seller, and the means and wishes of the buyer, influenced by soil, climate, population, intended use, access, markets—by an infinity of circumstances. In the nature of things, where the owner was bidden *and bound* to sell, but the applicant was *not bound but merely allowed* to buy, a minimum limit of area or price was not needed—indeed would have been absurd. The self-interest of the one would of itself fix a limit of price below which it would not sell, and that of the other a limit of area below which he would not buy.



Otherwise as to maximum limits. Unless a *maximum limit of area* for sale to one person were set, the company could wreck the congressional policy of inducing abundant immigration, and even fraudulent evasion of the settler clause would be facilitated. But also, unless the applicant and intending "actual settler" had a right, of his own choice, to buy a quantity sufficient for profitable settlement and use, the company could prohibit settlement. It could say: "We will sell you one acre." The limit of area was therefore essential as a *restriction* on the company and a quantity, compulsory on the company while optional on the applicant, *below which the former could not depress his demands*. That of itself proves that Congress created in the intending settler *a beneficial interest* to a definite amount at his option. Looked at in one way it is a restraint on the grantee of Congress. Looked at in the other way, it was an instruction to a trustee to dispose of the trust estate under limitations promoting the policy of Congress, and ensuring the rights of its beneficiaries against any arbitrary control by the trustee.

Likewise with the *maximum limit of price*. Obviously, unless that too were fixed, the Company could set a price of \$100 per acre for any quantity up to the limit of area. It would be as easy to nullify the policy of the Government by a prohibi-

tive price as by a minute area. In the nature of things, there must be control over the action of every trustee, to exclude sinister motives and secure good faith. If such requirements betoken distrust, then every trustee is feared and distrusted. Just as with the area, there was a price limit past which the company could not force the buyer, but a range of price up to that limit open to negotiation as usual. And just as with the area, that gave the buyer an optional power to compel a sale to him at that price, if he could do no better and was willing to pay that for the parcel he wanted. And similarly that gave him *a beneficial interest* in the trust estate, which became a fixed right to a definite parcel when it was selected; and therefore it became *a vested equitable right in that parcel*.

#### 4. *The duty of the trustee.*

All these limitations in the proviso are instructions to the company what to do or not to do. They are the contents of the trust. A trust without instructions, express or implied, is unthinkable. If it is an express trust, the words of the document lay down the instructions. If an implied trust, the court infers the instructions—and the limitations not to do otherwise, which are the negative side of the instructions. The counsel for the Government argues that there is no trust because of lack of

definite orders to the grantee what to do. But we have shown that there are either in words, or to be extracted by fair inference, very definite things to do within a discretion of elastic yet reasonable limits.

(1.) The granted lands are to be sold,—not sacrificed at slaughter prices, but marketed at reasonable prices:

- a. To actual settlers—*no discretion*.
- b. In quantities not over 160 acres—*a wide discretion*.
- c. At prices not over \$2.50 per acre—*a wide discretion*.

(2.) The proceeds of sales are to be retained by the company and used to build its road.

Now here are all the elements of a trust which we have been discussing: A “settlor” of the trust, a competent corporate trustee, a trust estate or subject-matter, beneficiaries pointed out in general terms and identified by their own acts under impulse of their self-interest, of which beneficiaries the trustee constitutes one, and duties definite within wide yet proper limits plainly prescribed—all to be found in the language of two acts of Congress.

Every one of the limitations and the elastic discretion within two of them comports with the whole land policy and the railroad grant policy of the United States. Nay more—they actively pro-



mote those policies. In no detail do they compete with them. The limits of buyer, area and price exactly accord with the Government's. The more land sold by the company under the given terms, the better for the railroad, the better for the Government as owner of adjoining lands, the better for the buyers, the better for the sparsely settled West, the better for the whole United States of America. Where can anyone find a single element in this situation which negatives a trust? It is definite within reasonable limits. All trusts are definite—some more, some less. It contains wide discretionary powers. Many trusts do. If honestly administered, it effectuates its object and realizes the general policy of which it is a part. And it is embodied in a form of words which are consonant with the idea of a trust and are capable of being so construed.

Much reliance was placed in argument on the demurrers below upon two cases involving provisos like the one here.

*Warrior River Coal & Land Co. vs. Ala. State Land Co.*, 154 Ala. 135; 45 Sn. 53.

*Nichols vs. Southern Oregon Co.*, 135 Fed. 232.

In the first case, there was a land grant by Congress to the State of Alabama to aid in the

building of railroads; the state (by the terms of a proviso) was to sell under limits like those in this case. The state held *in trust* to aid the railroad companies by paying them the proceeds. In a line of previous cases involving this land grant and proviso it had become settled law that the state had invested Swan & Billups with the legal title of *a large quantity* of lands which it conveyed to them *as trustees* and they sold out to others. These cases are cited in the opinions. This cause was ejectionment between a remote grantee of Swan & Billups and one in adverse possession. The validity or effect of the proviso was not involved. The case really turned on two questions: (1) Whether a certain deed by Swan & Billups was their deed *as trustees*; (2) Whether a dismissal of a prior bill to quiet title between the same parties operated as *res adjudicata*. Incidentally the court said: "The legal title to the granted lands having vested in the state, and the beneficial interest in the railroad company having become individualized as to the land and the companies respectively, the land here in controversy included, by the performance of all conditions precedent erected by the national grant, the limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting

government, and by that only. This record, of course, shows no such action on the part of the United States. Certainly, it will not be presumed, however conclusively a breach of the quoted condition was shown. Hence the objections urged as upon a violation of the stated condition subsequent is untenable.” 45 Sn. 54.

This is all that was said on that point. It is far from a holding that the proviso was a condition subsequent, and not a trust. As a piece of logic for the Government’s case, it begs the question. The only way to adjudicate to that effect would be to hold that one taking under a sale in violation of the proviso had no title.

The second case cited was a bill to compel conveyance by the Southern Oregon Company of a quarter section to one who had selected it out of a land-grant to the state under a similar proviso, and had tendered the limited price. The learned district judge, on demurrer to the bill, simply holds without discussion or citation that the grant was not a law for the sale; the restrictions were mere incidental regulations for the state to observe whenever it chose to sell, enforceable only by the United States and creating no interest in the complainant as a beneficiary. This enunciation is a mere *ipse dixit*, and seems to us valueless except as the indi-



vidual opinion of the writer. And it is weakened by the fact that the court holds that by sundry mesne transfers the trust, if any, had been openly repudiated for thirty years, Congress had taken no action, and the complainant was barred by lapse of time and by laches.

These two cases are the only ones that the great diligence of counsel for the Government has discovered as involving the proviso at bar.

Much argument was also expended by him in applying the common law doctrines of conditional estates to the proviso, and proving by many authorities that the words "provided," and "on condition that" are appropriate to conditions subsequent, and frequently introduce such. We do not dispute it. They often are so used. But the conclusion of the syllogism does not necessarily follow. It would follow only if it were shown that the words always are and must be read as a condition subsequent. Without that, it still remains a question of construction not of the bare words, as it were *in vacuo*, but of the words with the surrounding circumstances and in their light. The minute it is admitted that there is not a cast iron rule that a clause beginning "Provided that," or "On condition that" is a condition subsequent, that minute

all the mediaeval learning of Littleton and Coke becomes useless lumber as to a case like this.

Now that there is an abundance of cases holding that those words, and like conditional clauses create a trust and not a condition subsequent is indisputable. A few will suffice:

A conveyance "upon the condition that it shall be forever for the use of."

*Neely vs. Hoskins*, 84 Me. 386; 24 Atl. 882.

"With this express condition and limitation."

*Mills vs. Davidson*, 54 N. J. Eq. 659; 35 Atl. 1072.

"Upon the express condition that said premises shall be forever held and used," etc.

*Ashuelot Nat. Bk. vs. Keene*, 74 N. H. 148; 65 Atl. 826.

"On condition that the second party shall always continue to be called," etc.

*Mackenzie vs. Trustees*, 65 N. J. Eq. 652; 61 Atl. 1027.

"Upon condition that the said strip of land shall be forever kept open," etc.

*Greene vs. O'Connor*, 18 R. I. 56; 25 Atl. 692.

"Upon this express condition" that a devisee pay certain legacies.

*Wright vs. Wilkin*, 2 Best. & S. 232.

This case is instructive, because it holds that the devisee instead of forfeiting the estate for a breach, holds it in trust for the legatees whom he is to pay. He is in exactly the position of the railroad company here.

In *Mills vs. Davidson*, 54 N. J. Eq. 659; 35 Atl. 1072, above cited, is found the following pertinent remark:

“Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance for a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to, *not by the forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts.*”

And the Supreme Court of New Hampshire has well said that words of condition “*will not be held to have that arbitrary and technical effect and meaning, if such effect and meaning shall be found to be contrary to the intention of the parties or the policy of the law. The form of language will not necessarily control the sense, but will receive such an interpretation as circumstances and equity under those circumstances may require.*”



*Hoyt vs. Kimball*, 49 N. H. 322, 325.

That sums up our entire line of argument, and amply justifies the construction we put on the proviso. But a few words may be added on the contrary construction.

In testing an assumed construction by the rules of good sense and public policy, we must consider what parties under that construction could have done rather than what they actually did. Now if this proviso is a condition subsequent, of course a breach gave a right of instant forfeiture. Forfeiture of what? Of the whole unsold area? Or of only the parcels involved in the breach? If the breach were by sale of ten thousand acres at \$5.00 to a lumber company, would only those lands or the whole grant revert? And so of a breach by a refusal to sell a quarter section to an "actual settler." In other words, is the grant to be treated as severable or a single unit *quoad hoc*? Now the trust theory involves no such practical difficulties. A court of equity will carry it out, enforce the trust as to each applicant in detail and mould its decrees exactly to the circumstances.

A forfeiture if carried out would doubtless not destroy the vested rights of those who had bought within the limits stated, at least before breach, prob-

ably even before forfeiture declared and suit brought. But all tracts conveyed in breach of the proviso would be forfeitable. The rigor of the law would take its course. Yet it would be much more just and equitable to hold the railroad company to account for the land sold in violation of the terms of the proviso, on the ground of a trust and a tortious conversion of trust assets. That could be done only on the trust theory, and the tortious trustee could properly be held for the real value, not merely for the \$2.50 per acre, or for the excess of price over that figure. Such a course would not unsettle titles, since the Government could pursue the trustee and not disturb the purchaser.

Far more important, however, would be the practical effect of a forfeiture, if carried out, on the land policy of the Government. For it would throw a very large part of this grant back into the general domain of the public lands; it would annul the whole scheme of this grant until a new grant were made or other steps taken to parcel out the land to settlers. The grant was made with intent to have the lands disposed of on the terms stated. A court of equity on the trust theory can compel that to be done. It can even remove the trustee, appoint a new one and order him to dispose of the lands as agreed, and to pay the proceeds to the railroad

company, less the expenses of executing the trust. No court can enforce a forfeiture and at the same time effectuate the object and serve the policy of the grant. That is the best of all possible reasons for saying that Congress did not intend to make a grant involving a defeasance destructive of its moving cause.

CHARLES E. SHEPARD,

*Solicitor for Frank Terrace et al.,  
Intervenors.*

DEAN BURKHEIMER,

Of Counsel.





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No. 2400.

# United States Circuit Court of Appeals

## Ninth Circuit

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APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE  
DISTRICT OF OREGON.

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OREGON & CALIFORNIA RAILROAD  
COMPANY, a corporation, *et al.*,  
*Defendants and Appellants,*

JOHN L. SNYDER, *et al.*,  
*Cross-Complainants and Appellants,*

WILLIAM F. SLAUGHTER, *et al.*,  
*Interveners and Appellants,*

VS.

THE UNITED STATES OF AMERICA,  
*Appellee.*

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## BRIEF FOR INTERVENERS AND APPELLANTS

ELMER L. HANCOCK AND OTHERS, AND  
R. E. CAMERON AND OTHERS.

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JNO. MILLS DAY,  
M. E. BREWER,

*Solicitors and Attorneys for  
Interveners and Appellants.*

FILED





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# BRIEF FOR INTERVENERS -APPELLANTS

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and

R. E. CAMERON, AND OTHERS.

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## STATEMENT.

On May 25th, 1908, the United States filed in the Circuit Court of the United States for the District of Oregon, its bill of complaint setting forth in substance that the Congressional land grant of July 25th, 1866, conveyed the odd numbered sections of land along the right of way of the railroad companies mentioned, to the California and Oregon Railroad Company in California and a company to be designated by the Legislature of Oregon, in Oregon.

Section 6 of the Act is as follows:

“And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one



thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith."

Section 8 of the Act contained the following:

"And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this Act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States."

This Act was amended by an act of Congress, approved June 25th, 1868, extending the time for the construction of the road.

On October 6th, 1866, steps were taken and proceedings had for the purpose of organizing a corporation, styling itself The Oregon Central Railroad Company. This Company will hereafter be called the West Side Company.

On October 10th, 1866, the Legislature of Oregon, by resolution, designated this Company as the grantee to take title under the grant of July 25th, 1866.

On July 6th, 1867, this Company duly filed its acceptance of the grant in the office of the Secretary

of the Interior, as required by the Act of July 25th, 1866.

In the meantime in April, 1867, a second company was organized, styling itself also the Oregon Central Railroad Company.

This company is hereafter referred to as the East Side Company. The East Side Company, after its organization, influenced the Legislature of Oregon to adopt and it did, on October 20th, 1868, adopt a joint resolution in which it stated that there was no company lawfully organized at the time of the adoption of its resolution of October 10th, 1866, and thereupon designated the East Side Company to take the grant. A controversy arose between these two companies as to which was entitled to the grant.

The time having elapsed in which the East Side Company could accept the grant, it applied to Congress, for, and on April 10th, 1869, obtained the enactment of the amendment of the Act of July 25th, 1866, by which amendment the time for the acceptance of the grant was extended until one year from that date. A proviso was incorporated into the amendment of April 10th, 1869, which proviso was as follows:

“And provided, further, that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre.”

On June 30th, 1869, after the approval of this amendment, the East Side Company filed in the office of the Secretary of the Interior, its acceptance of the grant, and proceeded with the construction of its line of railroad.

On March 17th, 1870, the defendant, Oregon and California Railroad Company, organized as a corporation to take over all rights which the East Side Company had acquired under and by virtue of the Act of July 25th, 1866, and the amendments thereto and expressly stated in its Articles of Incorporation that the purpose of its organization was to comply with all of the provisions of said Act.

On April 27th, 1870, the Oregon and California Railroad Company filed with the Secretary of the Interior, its acceptance of the grant of July 25th, 1866, and the amendments thereto. The East Side Company having conveyed all of its rights to the grant, and all of its property to the Oregon and California Railroad Company, became dissolved and disincorporated, on March 29th, 1870.



Thereafter on May 4th, 1870, the West Side Company, having abandoned its right to the grant of July 25th, 1866, and having applied to Congress, therefor, secured from Congress another grant of land. Concerning this grant of May 4th, 1870, to the West Side Company, we will hereafter have little to say, as we are concerned with the East Side grant only.

The East Side road was constructed and most of the land embraced within the grant has been conveyed by patent to the Oregon and California Railroad Company. Meantime the Oregon and California Railroad Company has secured title to the property of the West Side Company, including most of the lands granted to the West Side Company under the Act of May 4th, 1870, which were not forfeited to the Government for failure to construct the road.

Both the East Side and the West Side roads have been leased to the Southern Pacific Company.

The defendant, Oregon and California Railroad Company, having sold certain of the lands granted in violation of the terms of the proviso in the amendment of April 10th, 1869, and also in violation of a similar proviso in the act of May 4th, 1870, and having finally monopolized and refused to sell

any of the lands then remaining unsold, at any price, or on any terms, the Legislature of the State of Oregon, by joint resolution, asked Congress to compel the Railroad Company to sell the lands, as provided by the laws of April 10th, 1869, and May 4th, 1870.

Congress by joint resolution of April 30th, 1908, authorized and directed the Attorney General to bring this suit, which the Attorney General did by filing his complaint in equity in the suit at bar, September 4th, 1908.

In substance the relief asked for by the Government is as follows:

1st. That all of the lands remaining unsold in both grants be forfeited to the Government, or

2nd. That receivers be appointed to take and be invested with title to the lands and be directed to convey the lands as required by the laws of April 10th, 1869, and May 4th, 1870, or

3rd. That the Oregon and California Railroad Company be required by mandatory injunction to sell and convey the lands according to the law, and that those aggrieved by the refusal of the Railroad Company to convey the lands to them, might come in and obtain relief in their own behalf.

Then follows prayers for injunction, accounting, and other relief, which prayers do not concern the rights of these interveners and which they will not be called upon to discuss.

Both prior to and subsequent to the filing of the Government's complaint, many people, including these interveners, applied to the defendant, Oregon and California Railroad Company, to purchase various tracts of land as provided by the act of April 10th, 1869, and tendered full performance of all requirements of said Act.

These tenders being refused by the Railroad Company, these interveners applied for and obtained leave to file their bills in intervention and filed such bills, in which bills they asked that they be permitted to settle upon and purchase the lands by them tendered for respectively.

The defendants, Stephen T. Gage and the Union Trust Company, claim to have certain interest in or liens upon the lands, which liens, if any they have, the interveners claim to be junior and inferior to the rights of the interveners.

To these bills in intervention the defendants, Oregon and California Railroad Company, Southern



Pacific Company and Stephen T. Gage, Individually and as trustee, interposed demurrers upon the grounds; first, that the bills do not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; second, that said bills do not show any cause or equity entitling the interveners to maintain their suit; third, that the bills do not show that the interveners are entitled to a discovery; and fourth, that the bills do not show that the interveners are entitled to any relief.

These demurrers were duly presented and on April 24th, 1911, overruled by the Court.

Thereafter on or about June 9th, 1913, Complainant filed its several motions to dismiss the bills of intervention of the interveners, for want of equity in such bills, which motion was on July 1st, 1913, sustained.

Thereafter on June 23rd, 1913, the Union Trust Company, individually and as trustee, filed its motion to dismiss the petitions in intervention and thereafter on the 25th of June, 1913, an order was entered by the Court sustaining said motion.

The evidence meanwhile having been adduced on behalf of the complainant and the defendants,

on July 1st, 1913, the Court entered a decree forfeiting the lands involved in the suit, including all lands claimed by the interveners, to, and quieting the title to the same in, the United States of America, and enjoining these interveners and others from claiming any interest therein.

From the various orders and decrees entered in favor of the complainant, all of the defendants, cross-complainants and interveners have prosecuted a joint appeal and from all orders and decrees entered in favor of the various defendants and against the cross-complainants and interveners, the cross-complainants have prosecuted a joint and several appeal.

From the numerous assignments of errors set up jointly and severally by the cross-complainants and interveners, those which we consider applicable to our cases and which we urge and rely upon are the following:

#### ASSIGNMENT OF ERRORS.

(Numbers in brackets are the numbers in the record.)

1. (91) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to

the bill of intervention of the intervener, Elmer L. Hancock, and the other interveners with him in his said bill joined, for want of equity in said bill, and

2. (92) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

3. (93) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

4. (94) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

5. (95) The Court erred in sustaining the motion of the complainants for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and



6. (96) The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

7. (97) The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

8. (98) The Court erred in not requiring the complainant to answer said bill in intervention, and

9. (99) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

10. (100) The Court erred in not granting to said interveners or any of them, any equitable relief.

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them, respectively, in said bill.

11. (151) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to the bill of intervention of the interveners, R. E. Cameron, and the other interveners with him in his said bill joined, for want of equity in said bill, and

12. (152) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

13. (153) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

14. (154) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

15. (155) The Court erred in sustaining the motion of the complainant for an order striking

the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

16. (156) The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

17. (157) The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

18. (158) The Court erred in not requiring the complainant to answer said bill in intervention, and

19. (159) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

20. (160) The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each



of them to the relief prayed for by them and each of them, respectively, in said bill.

21. (251) The Court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them, respectively, and

22. (252) The Court erred in not holding that these interveners and cross-complainants were entitled to the relief prayed for by them and each of them, respectively, and

23. (253) The Court erred in holding that none of these interveners and cross-complainants were entitled to the relief prayed for by them, and

24. (254) The Court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As their said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling these interveners and cross-complainants and each of them, to equitable relief; and

Said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

25. (255) The Court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

26. (256) The Court erred in not holding that the United States, complainant herein, was not entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

27. (257) The Court erred in holding that the lands or any thereof described in this decree, were and had been forfeited to the complainant, and that a decree be entered forfeiting said lands, or any thereof, to the complainant.

28. (258) The Court erred in holding that the lands sought to be purchased by the interveners and cross-complainants herein, should be forfeited.

29. (259) The Court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

30. (260) The Court erred in holding that the proviso in the said act of April 10th, 1869, was a condition subsequent.

31. (261) The Court erred in holding that the proviso in the amendment of April 10th, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed \$2.50 per acre was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

32. (262) The Court erred in not holding that the proviso in the amendment of April 10th, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed \$2.50 per acre, was not and is not a condition subsequent, the breach of which would entitle the United States, complainant, to a forfeiture of the lands covered by said grant.

33. (265) The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of the proviso of April 10th, 1869.



34. (266) The Court erred in holding that the consequence and penalty of forfeiture was intended by Congress to be attached to a breach, should such there be, of the covenant or proviso in the act of April 10th, 1869, requiring sales of land to settlers.

35. (271) The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side grant for the breach of an assumed condition subsequent if such there was, in said proviso of said act of April 10th, 1869.

36. (272) The Court erred in holding that there was jurisdiction in the Court on the equity side to decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed condition subsequent in the proviso contained in the act of April 10th, 1869.

37. (273) The Court erred in assuming jurisdiction on the equity side to enforce a forfeiture of the East Side grant for breach of an assumed condition subsequent in the proviso in the act of April 10th, 1869, as

(a) The effect of such assumption was to divest the interests of the interveners and cross-complain-

ants which had become vested, in parts of said East Side grant, under the terms of said proviso, and

(b) No declaration of forfeiture had ever been made by Congress prior to the vesting of such interest, and

(c) No declaration of forfeiture had been made by Congress prior to the entry of said decree, and

(d) No declaration of forfeiture had been made by Congress prior to the commencement of said suit.

38. (277) The Court erred in holding that by its joint resolution of April 13th, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize or empower the Court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the act of April 10th, 1869.

39. (279) The Court erred in holding that there was any cause of action or foundation of jurisdiction for forfeiture in respect to either of said grants, in any re-entry for breach of condition or legislation

equivalent thereof, or in any legislative declaration of forfeiture.

40. (280) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was not sufficiently definite to be enforced as a condition subsequent;

As such proviso does not contain any words importing a right of forfeiture or re-entry for condition broken.

41. (281) The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10th, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where



there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, *sestui que trustant*, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of \$2.50 per acre for each acre of the land so forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

42. (283) The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

(c) The defendant, railroad company, holds the legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

43. (284) The Court erred in not holding that the Government was estopped to claim forfeiture of the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the inter-

veners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein; and

(c) The Government having come into a court of equity, is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

44. (285) The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than \$2.50 per acre; and not positive provisions requiring sales to settlers in quantities not greater than one-quarter section to any one purchaser and at a price not greater than \$2.50 per acre.



45. (286) The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative, requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than \$2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than \$2.50 per acre.

46. (287) The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

47. (288) The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

48. (289) The Court erred in decreeing a forfeiture of those lands included in either or both of the grants to the railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad com-

pany the sum of \$2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30th, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

49. (290) The Court erred in holding that although the provisions in each and both of said land grants were designated to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers, by themselves monopolizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them except to such persons and in such quantities as it saw fit within the price and terms provided in the grant.

50. (291) The Court erred in not holding that the purpose of the joint resolution of Congress of April 30th, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performance had been decreed by the Court.

51. (292) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

52. (293) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized a forfeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

53. (294) The Court erred in holding that at the time of the filing of the bill of complaint herein and



ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said grants or either of them.

54. (295) The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

55. (296) The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

56. (297) The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

57. (298) The Court erred in holding as a foundation for a suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

58. (299) The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands, nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners and cross-complainants or any of them.

59. (300) The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

60. (301) The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.

61. (302) The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quited and confirmed, particularly as to any claim or claims of right, title and interest in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

62. (303) The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to, or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complainants or any of them.

63. (304) The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of



them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them, respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of July 25th, 1866, and the act of April 10th, 1869, amendatory thereof.

64. (305) The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them, respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25th, 1866, and the act of April 10th, 1869, amendatory thereof.

65. (308) The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

66. (309) The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or as-

serting any right, title interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

67. (310) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and cross-complainants or any of them, from claiming or asserting any right, title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

68. (311) The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

69. (312) The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

70. (313) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them,

71. (314) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869,

was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

72. (315) The Court erred in holding that the word “provided”, introducing the proviso contained in the amendatory act of April 10th, 1869, imported a condition subsequent, as

(a) The word “provided” is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to accept said grant one year after the passage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

73. (316) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the



railroad company to accept and become vested with the title to the lands under the grant of 1866.

74. (317) The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by each, respectively, upon payment of the purchase price therefor.

75. (318) The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

76. (319) The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

77. (320) The Court erred in holding that Congress did not intend by the act of April 10th, 1869,

to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

78. (321) The Court erred in not holding that Congress intended, by the act of April 10th, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

79. (324) The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

80. (325) The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the

benefit of and enforceable by the interveners and cross-complainants.

81. (326) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

82. (327) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

83. (330) The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and, in that



(b) "They are not susceptible of identification as such," and

84. (331) The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

85. (332) The Court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

86. (333) The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and Cali-

ifornia Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances, by the Oregon and California Railroad Company.

87. (334) The Court erred in holding that the proviso in the act of April 10th, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

88. (335) The Court erred in not holding that the proviso in the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

89. (336) The Court erred in holding that the proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

90. (337) The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress

as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

91. (338) The Court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

92. (339) The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler,



upon the terms and under the conditions provided in said grant.

93. (340) The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settlor of the trust in said lands.

94. (349) The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action, except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

95. (350) The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government cannot be had.

96. (351) The Court erred in not holding, on the assumption that the said proviso in the act of April 10, 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

97. (353) The Court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

98. (354) The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

99. (355) The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

100. (356) The Court erred in not holding that the evidence in this cause is insufficient to support or sustain the decree rendered.

101. (357) The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

102. (358) The Court erred in not holding that the evidence adduced in support of the com-



plaint of the United States, complainant herein, was not sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

103. (359) The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

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## ARGUMENT

We have omitted from our Statement and from the Assignment of Errors all matters which alone relate to the "West Side Grant" for the reason that the clients which we represent are only interested in the so-called "East Side Grant."

## CONDITIONS SUBSEQUENT

### COMPLAINANTS' RIGHT TO FORFEITURE

### ASSIGNMENT OF ERRORS HEREIN NUM-

BERED 25, 26, 27, 28, 29, 30, 31, 32, 33,

34, 40, 47, 99 AND 100

The crucial question presented by the Assignment of Errors above enumerated is as to the intentment of Congress as expressed by the clause contained in the amendment of April 10, 1869, which is as follows:

“And provided, further, that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.”

We do not believe that this proviso was intended by Congress as a condition subsequent, for the reasons:

(a) That the proviso is not coupled with and does not relate to the granting clause, or any habendum clause of the grant, and

(b) It does not contain, and is not coupled with any language importing the consequence or penalty of forfeiture for its breach.

The Act of July 25, 1866, to which the Act of April 10, 1869, is amendatory, provided that the grantees should file their assent within one year after the passage of the act and complete the first twenty miles of railroad within two years, and the whole before July, 1875.

On June 25, 1869, this act was amended extending the time for building the road; on July 25, 1869, the amendatory act in question was passed.

It provides that Section 6 of the Act of July 25, 1866, be amended so that the railroad companies shall have one year from date of passage of the act to file their assent. \* \* \* \* \*

“And provided further that the lands granted by the act aforesaid shall be sold to actual settlers only,” etc.

Section 8 of the act of July 25, 1866, provides that the title of the railroad companies to the land shall be forfeited, if they shall fail to file their assent or to build said road within the time allowed.

This Section 8 was not amended by the Act of April 10, 1869.

It seems apparent that if by the proviso in question, Congress had intended to engraft upon the title conveyed by the grant, a condition subsequent for breach of which, forfeiture might be had, it would certainly have amended Section 8 to so specifically provide. We contend that the rule *expressio unius est exclusio alterius* should be applied in interpreting the grant; that the grant should be read and interpreted as though the amendment of



April 10, 1869, were in fact a part of Section 6 of the original act, which in law it is.

The only thing there is in the grant or in this proviso which can be construed as importing a right of forfeiture by the Government is the word provided. This word provided does not always import a condition.

“ ‘This word hath diverse operations. Sometimes it worketh a qualification or limitation, sometimes a condition and sometimes a covenant.’ Co. Lit. 146 B., 203 B.” Cyclopedic Law Dictionary 739.

See also *Stanley vs. Colt*, 5 Wall (U. S.) 119.

And when this word imports a condition it does not always import a condition subsequent.

“Domat says conditions are of three sorts, the first tend to accomplish the covenants, to which they are annexed. The second dissolve covenants, the third neither accomplish nor avoid, but create some change.” Cyclopedic

Law Dictionary, 184.

We contend that the proviso in question is a condition of the third sort which neither accomplishes a pre-existing covenant in the grant nor provides for its avoidance on breach, *but creates a change in the pre-existing covenant by requiring a certain disposal of the property conveyed.*

See *Stanley vs. Colt*, *supra*.

IF PROVISIO IS CONDITION IT IS CON-  
DITION PRECEDENT

NO RIGHT OF FORFEITURE

ASSIGNMENT OF ERRORS 71, 72, 73

We maintain that the word provided does not import a condition subsequent, but that it does import a covenant to be assented to by the grantees as a condition of their right to accept the grant.

We maintain that this is apparent for the reason that this proviso is not coupled with the granting clause or any habendum clause of the Act, and no reference to the granting clause or habendum is made in this proviso, but the proviso is coupled with and contained in the same paragraph and sentence with the amendment of Section 6 of the Act extending the time for acceptance.

The word provided, therefore, if it imports a condition at all imports a condition precedent.

In this connection it will be noted that the Act of May 4, 1870, granting land to the West Side Company contained the following proviso:

“Sec. 4. That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to re-

serve for depots, stations, side tracks, wood yards, standing grounds and other needful uses in operating the road, shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or a quarter section to any one settler, or at a price not exceeding two dollars and fifty cents per acre."

It will be noted that this Act did not contain the word provided, neither is there in the Act any provision whereby the title will revert to the Government on breach.

While the Act of 1870 is not a part of the grant of 1866, its enactment is so closely associated with that grant that, as stated by the trial court, it should be considered *in pari materia*.

## WHETHER PROVISIO IS OR IS NOT A CON- DITION IT IS A COVENANT

### ASSIGNMENT OF ERRORS 44, 45, 46, 47 AND 49

This proviso requires the railroad company to sell the land to settlers. While it is negative in its form, it is also positive. The railroad company accepted the grant and agreed to be bound by its provisions.



If there is a doubt as to whether it is a condition subsequent or a covenant or both, the Court should construe it as a covenant.

“It is not easy to say when a condition will be considered a covenant and when not, or when it will be holden to be both.”

Bouviers Law Dictionary, Vol. 1 p. 262.

In support of our claim that a condition subsequent and a covenant may be created by the same words, we cite:

*Hall vs. Finch*, 104 U. S. 261.

*Platt on Covenants*, 70, 71.

*Elyton Land Co. vs. Smith*, 100 Ala. 405.

*Parmelee vs. Oswego, etc., R. Co.*, 6 N. Y. 80.

*Country vs. Deek*, 13 Abb. N. Cas. 111.

*Paschall vs. Passmore*, 15 Pa. St. 307.

*Harting vs. Witte*, 59 Wis. 292.

“The same words may be employed to create a covenant as to create a condition, and if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions, which tend to destroy estates are not favored, and are strictly construed.”

6 Amer. & Eng. Ency. of Law, 2nd Ed., p. 502, and note 9 citing many cases.

But the court has held in this case that the proviso is not positive but negative; that it does not require the railroad company to sell the land to settlers, but that it requires it to refrain from selling the land to others than settlers and to refrain from selling it in quantities greater than one quarter section.

We insist that this holding cannot bear the light of reason. We contend that the purpose of Congress was to compel the railroad company to sell the land to settlers in small quantities.

Even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by words and acts of Congress, *in pari materia*.

*U. S. vs. Union Pacific R. R. Co.*, 91 U. S. 72.

*Holy Trinity Church vs. U. S.*, 143 U. S. 457.

In the latter case the court said:

“Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”

Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of

April 10, 1869, a short time before said Act was adopted, in explaining to Congress the purpose of an amendment to another act, in exactly the same language, said: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd numbered sections," etc.

If the proviso were to be construed only as a negative covenant, it is apparent that the railroad company might monopolize and hold these lands indefinitely and the purpose of Congress to devote it to settlement and tillage would be as completely frustrated as though the railroad company had sold to one person the entire grant.

AS TO THE PURPOSE AND EFFECT OF  
JOINT RESOLUTION OF CONGRESS  
OF APRIL 30, 1908

ASSIGNMENT OF ERRORS HEREIN NUM-  
BERED 39, 39, 50, 51 AND 52

In the resolution adopted by Congress April 30, 1908, Congress expressly declared that it was not intended thereby to determine "the right of the



United States to a forfeiture.” By this resolution Congress not only *did not declare a forfeiture, but expressly stated that it did not even intend by the resolution to determine its right to do so.*

The Attorney-General could not declare a forfeiture. The legislative body alone can do so.

*State of Minn. vs. Duluth & I. R. R. Co.,* 97  
Fed. Rep. 353.

A legislative declaration of forfeiture to be effective must be clear and unambiguous.

*State of Minn. vs. Duluth & I. R. R. Co.,*  
*Supra.*

AS TO THE JURISDICTION OF THE COURT  
TO DECLARE OR DECREE FORFEITURE  
ASSIGNMENT OF ERRORS HEREIN NUM-  
BERED 35, 36, 37, 64, 65, 66 AND 67

Courts of Equity will not lend their aid to forfeiture. “Equity abhors a forfeiture” is a familiar maxim. This principle is so well known and so well established that the citation of authority is wholly unnecessary. The maxim is as true, and as applicable where the Government is a party as in case of a private suitor.

*Brent vs. Washington Bank*, 10 Pet. (U. S.)  
596.

*U. S. vs. U. P. R. R. Co.*, 105 U. S. 263.

## IF JURISDICTION INHERED THE DECREE IS INEQUITABLE

### ASSIGNMENT OF ERRORS 41, 42, 43 AND 96.

Assuming for the purpose of the discussion that the proviso is in form a condition subsequent, still forfeiture is inequitable, for the reasons:

(a) It divests the railroad company of its vested interest to the extent of \$2.50 per acre in the land.

(b) It deprives the interveners of their just rights and divests their vested interests.

(c) It frustrates the purpose of the grant.

*In the suit at bar the court had the means at hand to carry into effect every provision of the law and do equity between all parties, without lending its aid to forfeiture.*

A provision in the form of a condition may be specifically enforced as though it were a covenant without forfeiture, and its performance is in fact the very reverse of a forfeiture.

*Pomeroy's Equity Jurisprudence*, Vol. 1, 50,  
note 2.

*Livingston vs. Sickles*, 8 Page 398; 7 Hill  
253.

*Carpenter vs. Callin*, 44 Barb. 75

*Leach vs. Leach*, 4 Ind. 628.

And in order that a forfeiture may be avoided and justice promoted, equity will frequently regard a condition subsequent as a trust and specifically enforce it for the benefit of third persons.

*Tiffany on Real Prop.*, Vol. 1, p. 185, and  
note.

*Tomlin vs. Blunt*, 31 Ill. App. 234.

*Smith vs. Jewett*, 4 N. H. 530.

1 *Smith's Leading Cases*, 142.

*West vs. Bescoe*, 10 Md. 460.

The case of *Smith vs. Jewett*, *supra*, was one in which land was devised by will to the widow, upon the condition subsequent, that the widow support two daughters of the testator.

Upon condition broken the heirs brought suit in equity for a forfeiture, also praying for other relief. The widow admitted in her answer that she



had broken the condition in the will. The court, however, refused to entertain suit for forfeiture, but suggested that if the parties saw fit to so frame their pleadings that specific performance might be decreed to compel the widow to maintain the daughters, such relief might be granted.

The theory upon which courts of equity specifically enforce a condition subsequent as a covenant is that the language of the condition imports a covenant as well, and to avoid a forfeiture of the condition they specifically enforce the covenant.

The maxim “he who seeks equity must do equity” has been held specifically applicable to the United States when a suitor.

*Brent vs. Washington Bank*, 10 Pet. (U. S.)  
596.

## TRUST RELATIONSHIP—VESTED RIGHTS —EQUITY IN INTERVENTION BILLS

ASSIGNMENT OF ERRORS HEREIN NUM-  
BERED 1 TO 24 INCLUSIVE, 48, 74 TO 77  
INCLUSIVE, 79 TO 95 INCLUSIVE,  
97, 98, 101, 102 AND 103

The proviso in the amendment of April 10, 1869, is in the following language:

“And provided, further, that the lands granted by the Act aforesaid, shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.”

This proviso is, of course, primarily a law, and should be carried into effect according to the intent of Congress, as heretofore shown. This being true, it would be unnecessary to determine what kind of conveyance it is, according to the common law classification, but for the fact that we must, of necessity, do so in order to determine what it does.

The only theory upon which a law can operate to convey an estate in property is, that the proposal in the law is a promise or covenant. The promise or covenant may be of such nature, that he who brings himself within the provision of the law, becomes seized of a legal estate in the lands proposed by the law to be conveyed, or it may be of such a nature that he who brings himself within the provisions of the law, becomes seized of a legal estate in the lands proposed by the law to be conveyed, or it may be of such a nature that he who brings himself within the provision of the law be-

comes vested with an equitable estate to which another is conveyed a legal estate for his benefit.

Whether or not this proviso is, or is not, in the form of a condition subsequent, or whether it could or could not, under proper circumstances and in a proper case, operate to defeat the title of the railroad company, is not, as we have heretofore shown, material in the consideration of this appeal.

*The interveners have secured vested rights by the operation of the same law that gave the railroad company title to the land, and the court has, by its orders and decrees, deprived them of these rights.*

That a vested interest in property conveyed by a public grant may be acquired by a grantee, by bringing himself within the purview of the law, after its enactment, has been very frequently held.

26 *Am. & Eng. Ency. of Law*, 221 and note 2, citing many cases decided by the United States and many of the state courts.

That the proposals in the law when accepted become contracts and within the protection of the Federal Constitution, has also been frequently held.

26 *Am. & Eng. Ency. of Law* (2nd Ed.), 222; note 1.



The grant in the case at bar is a three party contract between the Government, the railroad company and the interveners.

It is well established that where a grant is made charged with a trust, the interest which the *cestui que trust* has under the grant may sustain it against legislative interference, a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest.

*Cooley on Con. Lim.*, 344, Note 1. Also page 333 and cases cited Note 1.

*Trustees of Dartmouth College vs. Woodward*, 4 Wheaton (U. S.) 518.

It has been frequently held that where one who had a right to acquire property by performing certain acts as provided by law, had tendered performance and performed as far as permitted, he acquired a vested interest in the property.

*Beaty vs. Sale*, 92 Am. Dec. 128.

*Claimants vs. Warner*, 24 How. 394.

*Gaugh vs. Dorsey*, 27 Wis. 119.

*Shipley vs. Cowan*, 91 U. S. 330.

In the last case above cited, the plaintiff had settled upon and applied to purchase a pre-emption

claim, but the officers of the land office declined to accept proofs on the grounds that the land had been reserved for another.

The court held that the plaintiff had vested rights which were not and could not be defeated by the refusal of the officers to recognize them.

These interveners claim that they have vested interests in the real estate applied for by them, respectively, which Congress itself could not by act of forfeiture or otherwise, lawfully divest, and that the orders and decrees herein appealed from infringes these rights.

A vested right is an immediate fixed right of present or future enjoyment.

*6 Am. & Eng. Ency. of Law*, 956.

*Kent's Com.*, 202.

It is also defined as a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

*Cooley on Const. Lim.*, 438.

A vested right of action is property in the same sense that tangible things are property.

*Cooley on Const. Lim.*, 343.

That the proviso is in fact a covenant, which gives rise to a trust, and that the interveners, by offering to comply with, and in so far as they are permitted, complying with, the law, have brought themselves into relation therewith as *cestuis que trustent*, and as such, have vested interests in the various tracts of land for which they have, respectively, applied, we shall now proceed to show.

“A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.”

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 858.

This is in the nature of a public trust and the railroad company holds title for the benefit of a particular class of people.

“A public, or charitable, trust is one constituted for the benefit of the public at large or of some considerable portion of it answering a particular description.”

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 855.

We have, in the present case, all of the circumstances which give rise to a valid trust.



“For the creation of a valid trust, three circumstances must concur: first, a definite subject-matter within the disposal of the settlor; second, a lawful definite object to which the subject-matter is to be devoted; third, clear and unequivocal words or acts, devoting the subject-matter to the object of the trust.”

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 865, 866.

The definite subject-matter within the disposition of the settlor—the Government—is the land within the grant; the lawful, definite object to which the land, the subject-matter is to be devoted, is settlement and ownership by settlers, in small quantities; the words and acts devoting the subject-matter to the lawful object are the words in the proviso in question, viz.:

*“That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.”*

We claim that these words are sufficient to create a trust.

“The creation of a trust requires no prescribed form of words, and any expression which evinces the settlor’s present intention to place his beneficial interest in specified property absolutely beyond his control, for the bene-

fit of some person or object, is enough, and even precatory words, if, as a whole, the intention appears that they are intended as imperative, will create a valid trust."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 866.

But, even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by words and acts of Congress, *in pari materia*.

*U. S. vs. Union Pacific R. R. Co.*, 91 U. S. 72.

*Holy Trinity Church vs. U. S.*, 143 U. S. 457.

In the latter case the court said:

"Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

As we have heretofore said.

Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of April 10, 1869, a short time before said Act was adopted, in explaining to Congress the purpose of an amendment to another act in exactly the same language, said: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to set-

tlement and tillage the odd numbered sections," etc.

If the purpose of Congress was to "devote to settlement" the land conveyed by the grant, a trust was in fact created.

"If a contract creates interests distinct from the legal ownership of the property involved, or if a contract, being lawful and enforceable, is made with the intention of devoting specific property to specific purposes, equity, in order to give effect to the rights created or to the intention of the parties, will raise a trust in the property enforceable against the holder of the legal title and those claiming under him voluntarily or with notice."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 904-5.

But the trial court has held that this proviso cannot be enforced as a trust because the language is too meager.

"Where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced."

*In re Smith's Estate*, 144 Pa. 428.

The court has held also that even though the proviso reflects the general purpose of Congress, that it cannot be enforced as a trust for the reason that the beneficiaries are not pointed out with sufficient certainty.



We assert that the people to be benefited by this Act are sufficiently defined.

In the case of *ex parte Lindley*, 32 Ind. 367, the following was held sufficiently definite:

“A devise to the education of the colored children in the State of Indiana.”

In the case of *Chapin vs. School Dist.*, 35 N. H. 444, the following language was held sufficiently definite:

“The inhabitants of the second school district in Winchester.”

In *Perrin vs. Carey*, 65 U. S. 465, the following was held to be sufficiently definite:

“To the support of the poor white male and female orphans neither of whose parents are living.”

In *Jones vs. Habershaw*, 107 U. S. 174-191, the following was held sufficiently definite:

“To one or more Presbyterian or Congregational churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the state.”

\* \* \* “For the relief of distressed widows, and the schooling and maintaining of poor children.” \* \* \* “For the relief of indigent widows and orphans in the City of Savannah.”

In the case of *Vidal vs. Gerards*, Exec., 2 How. (U. S.) 125, the following was held sufficient:

“As many poor white male orphans between the age of 6 and 10 years as the income shall be adequate to maintain.”

In *Trustees of Dartmouth College vs. Woodward*, 4 Wheat. (U. S.) 512, the following:

“To the students who should attend the college.”

In the case of *Tomlin vs. Blunt et al.*, 31 Ill. App. 234, the following was held sufficient:

“Evangelical Order of Christians.”

In view of the fact that forfeitures are never favored and are only granted even in courts of law, when the right thereto is definite and certain, and that trust covenants should be interpreted and enforced to effectuate their purpose, it seems strange to us that the trial court could find that this proviso was sufficiently definite so that a forfeiture might be had for its breach, and yet not sufficiently definite to enforce specifically.

In other words, was not the trial court first required to determine, and did he not determine, what the railroad company should do before he could determine or did determine that it had

breached the covenant in the grant? And if the language of the grant is sufficiently definite so that he could determine what it should do to comply with the grant, could he not as well have required the company so to do, as to divest it of title for breach?

The Oregon and California Railroad Company by accepting and agreeing to be bound by the Act of July 25, 1866, and the amendments thereto, and stating in its articles of incorporation and the conveyance by which it acquired title from the Oregon Central Railroad Company to the grant, that it was organized for the express purpose and with the express intention of complying with the terms of the grant *and amendments thereto*, impressed upon the granted lands a trust which may be enforced by these interveners, independent of any right which the Government might have to enforce the terms of the grant.

“The settlor may, without parting with the possession of the subject-matter of the trust, himself assume the character of trustee, with respect to property already owned by him, or upon the acquisition of property in pursuance of a previous agreement. *It is not necessary that this be done in express terms*, but in the absence of statutory requirements *any words or acts are sufficient which clearly denote his*



*intention* to relinquish his beneficial interest in the property in presenti and to hold it for the benefit of another, and this without regard to whether the property is equitable or legal or whether it is capable or incapable of transfer at law.”

28 *Am. & Eng. Ency. of Law*, 898, and Note 11, citing cases from England, U. S., Alabama, California, Connecticut, Georgia, Illinois, Kentucky, Maine, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina and Vermont.

And

“If a trust has been once perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary, and the subsequent acts of the settlor or the trustee cannot affect it.”

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 899, and Note 7, citing many cases from England, Canada, United States, California, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Vermont and West Virginia.

And equity will aid a volunteer beneficiary in enforcing his trust even though the settlement of the trust were gratuitous.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 889-90, and Notes 1 and 2.

And the settlor of the trust may himself compel specific performance in a court of equity.

*Chapman vs. James*, 4th Ore. 362.

*Warren vs. The City of Lyons*, 22 La. 357.

*Abbott vs. Gregory*, 39 Mich. 68.

*Gressom vs. Hill*, 17th Ark. 483.

*And the trust may be declared by a separate instrument from the one conveying or describing the estate.*

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 900.

And where the trustee refuses or neglects to carry out the terms of the trust the beneficiary may compel performance.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 1121, and Note 7, citing many cases.

As we have heretofore shown, the declaration of trust is sufficient if it shows the intention of the settlor.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 866.

We insist, therefore, that this trust should be construed as an executed trust, that is, as sufficiently

defining the right of the *cestuis que trustent*, and the responsibility of the trustee, when the intent and purpose of Congress, gleaned from its acts and proceedings *in pari materia*, are considered in connection with the words of the proviso.

The intent and purpose of Congress was, no doubt, as heretofore shown, that the settlor should have the right to settle upon the land and purchase any amount that he saw fit, not to exceed one-quarter section, by paying to the railroad company the largest amount which the railroad company had a right to charge for the land.

To construe the law otherwise would be, to make it ineffectual to accomplish the purpose for which it was designed, and would not "avoid the complete monopoly" of the lands. For if the railroad company had a right to refuse to sell to A, it would likewise have a right to refuse to sell to B and C, and so on *ad infinitum*. Likewise if it had a right to refuse to sell 160 acres, it would have a right to refuse to sell 80 acres or 40 acres or any other given amount, and would have a right to refuse to sell any land whatever.

Therefore, the purpose and intention of Congress can only be made effectual, and the complete



monopoly of the lands avoided, only, by giving the settler the right to purchase the largest amount by tendering the highest price within the limits of the law.

The trust instrument must be construed to carry into effect the purpose of the settlor of the trust.

“In construing instruments creating or declaring trusts, the rule is that the intent of the parties controls and that the substance and effect of the instrument as a whole must be considered, and its mere form will be disregarded.”

28 *Am. & Eng. Ency. of Law*, 910, and Note 10.

As we have heretofore shown, this is especially true where the trust is created by a congressional grant as the grant is a law as well as a conveyance, and must be so construed, solely with a view to promote the purpose of Congress.

And where the instrument is susceptible of two constructions, the construction which will best carry out the general scheme of the trust, will be adopted.

*Dexter vs. Episcopal City Mission*, 134 Mass. 394.

But if the court should construe the law otherwise and hold that the trust was an executory trust which gave the railroad company the right to exercise a discretion as to the amount of land within the quantitative limit fixed by the law, which it should sell to each settler, these interveners would still have a standing before this court, and would be entitled to the relief asked.

“A court of equity has inherent power to take upon itself, through its officers or agents, the execution of the powers and duties of a trust, upon the failure or refusal to act of the duly appointed trustee,” etc.

28 *Am. & Eng. Ency. of Law*, 1098-99.

“When the court is called upon to execute the trust, it will not generally attempt to exercise discretionary powers conferred upon the trustee. But it may, in a proper case, order a reference to determine what course of action will be beneficial to all parties interested.”

28 *Am. & Eng. Ency. of Law*, 1098.

And it has been held that when a trustee of an executory trust refuses to exercise the discretion with which he is vested, in bestowing the benefits of the trust upon the *cestui que trust*, he will be compelled to bestow the largest benefit permitted by the terms of the trust.

*Young vs. Young*, 1 *Jurist*, 840.

The defendant railroad company contends that the proviso requiring the railroad company to sell the land to settlers for \$2.50 per acre, in quantities not greater than one-quarter section, being a covenant, is “unenforceable by the cross-complainants and interveners because they are third parties to it.”

A person for whose benefit a covenant is made may enforce the same, though not a party to the agreement.

11 *Cyc.*, 1095, and Note 37.

And he may do this though there may be no provision of the code expressly authorizing such action.

*Douglass vs. Mobile Branch Bank*, 19 Ala. 659.

*Ducan vs. Moon*, Dudley (S. C.) 332.

*Johnson vs. McClung*, 26 W. Va. 659.

But Section 27 of Chapter 3 of the Code of Oregon, expressly providing that “actions shall be prosecuted in the name of the real party in interest,” authorizes any person for whose benefit a contract is made, to sue thereon.

*Hughes vs. O. R. & N. Co.*, 11 Oregon 439.



*Baker vs. Elgin*, 11 Or. 333.

*Chrisman vs. State Ins. Co.*, 16 Or. 388.

*Strong vs. Kamm*, 13 Or. 172.

*Feldman vs. McGuire*, 34 Or. 311.

And the beneficiary may sue even though he was not informed of the contract until after it was made.

*Schneider vs. White*, 12 Or. 503.

And the real party in interest may enforce his rights though he has acquired his rights without consideration.

*Gregoire vs. Rourke*, 28 Ore. 275.

*And it has been frequently held that codes of a state conferring right of action, might be taken advantage of in suits in the federal courts within the state.*

*Holland vs. Challen*, 110 U. S. 15.

*Wehman vs. Conklin*, 155 U. S. 314.

That the interveners are real parties in interest, we have heretofore shown.

For the foregoing reasons these interveners maintain that the orders and decrees heretofore

entered against them should be reversed and set aside, and that they should be given the relief prayed for in their bills.

Respectfully submitted,

JNO. MILLS DAY,  
M. E. BREWER,  
*Attorneys for Interveners.*

No. 2400

# In the United States Circuit Court of Appeals

Ninth Circuit

OREGON & CALIFORNIA RAIL-  
ROAD COMPANY, a corporation, et  
al,

Defendants and Appellants,

JOHN L. SNYDER, et al,

Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al,

Intervenors and Appellants,

vs.

THE UNITED STATES OF AMERICA,  
Complainant and Appellee.

Appeal from the United States Circuit Court for  
the District of Oregon.

## Brief for Cross-Complainants

A. W. LAFFERTY,

Attorney for Cross-Complainants.





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WILLIAM F. SLAUGHTER, et al,

Intervenors and Appellants,

vs.

THE UNITED STATES OF AMERICA,  
Complainant and Appellee.

Appeal from the United States Circuit Court for  
the District of Oregon.

## Brief for Cross-Complainants

(a)

### STATEMENT OF CASE.

John L. Snyder started this litigation by filing in the United States Court at Portland, on Sept. 16, 1907, his suit to compel the defendant railroad company to sell him 160 acres of the land involved.

Snyder became an actual bona fide settler on the land before applying to purchase same under the Act of May 4, 1870. Following Snyder's suit 64 other bona fide settlers filed identical suits.

The Cross-Complainants maintain that actual settlement on the land is necessary as a prerequisite to applying to purchase or filing suit. They oppose the contentions of the "Intervenors," who merely applied to purchase but were not actual settlers.

The Court sustained the Demurrers of the Defendants to the Bills of the Cross-Complainants and they have appealed to this court.

(b)

### SPECIFICATIONS OF ERROR.

The Court erred in sustaining the Demurrer of the Defendants to the Bills of Complaint of the Cross-Complainants by holding that the acts of congress of April 10, 1869 and May 4, 1870, granted estates upon condition to the defendant railroad company instead of estates in trust, as maintained by Cross-Complainants. This is the decisive point in the case.

(c)

### BRIEF OF ARGUMENT.

The grant is one in trust and not an estate upon condition.

Platt vs. Union Pacific, 199 U. S., 48-60.

United States vs. Michigan, 190 U. S., 379.



United States vs. New Mexico, et al, District Court New Mexico, unreported but copy will be presented.

United States vs. Des Moines, etc., Co., 142 U. S., 527.

Colfield vs. McClelland, 16 Wallace, 331.

Goldberg vs. Kiss, 5 S. Dak., 169.

Stingfellow vs. Kane, 99 U. S., 610.

Mills Co. vs. Railroad Companies, 107 U. S., 507.

Morgan vs. Rogers, 79 Fed., 577.

Rice vs. Railroad Company 1 Black, 378.

Railroad Co. vs. Prescott, 16 Wallace, 607.

Topeka Commercial Security Co., vs. McPherson, 7 Okla., 332.

The two decisions last cited show that the railroad company has no right to pay taxes on these lands and thereby assume the position of a fee-simple owner. All the foregoing decisions show that this was a conveyance in trust and not a conveyance on a condition subsequent.

Respectfully submitted,

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